TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 243.

ABRAM ROSENBERGER, PLAINTIFF IN ERROR,

vs.

PACIFIC EXPRESS COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED SEPTEMBER 19, 1914.

(24,370)

(24,370)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 249.

ABRAM ROSENBERGER, PLAINTIFF IN ERROR,

vs.

PACIFIC EXPRESS COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 5, 1915.

1 In the Supreme Court of Missouri, Court in Banc, July 14th, 1914.

ABRAM ROSENBERGER, Respondent (Plaintiff in Error),
vs.
PACIFIC EXPRESS COMPANY, Appellant (Defendant in Error).

Now at this day, there is presented to the Honorable Henry Lamm, Chief Justice of the Supreme Court of the State of Missouri, in Chambers, a petition for a writ of error, to the Supreme Court of the United States, a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, an assignment of errors, a bond, to operate as a supersedeas, in the sum of Two Hundred Dollars, and citation directed to the said Appellant (Defendant in Error), citing and admonishing it to be and appear at the Supreme Court of the United States within thirty days from the date thereof; which said writ of error is allowed, said citation signed, said assignment of errors filed, and said bond, to operate as a supersedeas, approved, ordered filed and made part of the record herein.

2 The Supreme Court of the State of Missouri.

No. 16502.

ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Petition for Writ of Error.

Considering himself aggrieved by the final decision of the Supreme Court of Missouri in rendering judgment against him in the above entitled suit, the respondent, Abram Rosenberger, prays a writ of error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of a supersedeas bond. An assignment of errors and prayer for a reversal of the judgment of the Supreme Court of Missouri are hereto attached and made a part hereof.

FRANK F. ROZZELLE,
J. J. VINEYARD,
A. F. SMITH,
Attorneys for Petitioner, Abram Rosenberger.

3 The writ of error as prayed for in the foregoing petition is hereby allowed this 14 day of July, A. D. 1914, the writ of

error to operate as a supersedeas and the bond for that purpose is fixed at the sum of Two Hundred ($200.) Dollars.

Dated at Jefferson City, Missouri, this 14 day of July, A. D. 1914.

HENRY LAMM,
Chief Justice Supreme Court of the State of Missouri.

Filed in my office this 14th day of July, A. D. 1914.
J. D. ALLEN,
Clerk Supreme Court of the State of Missouri.

3½ Endorsed: In the Supreme Court of the State of Missouri. No. 16502. Abram Rosenberger, respondent, vs. Pacific Express Company, appellant. Petition for writ of error. Filed Jul-14, 1914. J. D. Allen, clerk.

4 The Supreme Court of the State of Missouri.

No. 16502.

ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Assignment of Errors and Prayer for Reversal.

Now comes Abram Rosenberger, the above named respondent herein, and represents that on to-wit: May 15th, 1909, he recovered a judgment in the above entitled suit for Eight Hundred One and Thirty Hundredths ($801.30) Dollars against Pacific Express Company appellant, in the Circuit Court of Jackson County, Missouri; that in said suit on to-wit: May 20th, 1914, the Supreme Court of Missouri, being the highest court in said state in which a decision in the suit could be had, after a consideration of said suit on its merits, rendered judgment reversing said judgment of said Circuit Court without remanding said suit, which judgment of said Supreme Court of Missouri, under the laws of Missouri, (Strottman v. St. Louis etc. Co., 228 Mo. 154), was a final decision of said suit in favor of said appellant, Pacific Express Company, and against the plaintiff, Abram Rosenberger, on the merits.

Said respondent, Abram Rosenberger, files herewith his petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment of errors:

4½ The Supreme Court of Missouri erred in holding and deciding that the law passed by the Legislature of the State of Texas and approved February 12th, 1907, and found in the general laws of the State of Texas passed by the state legislature of Texas at its session convened January 3rd, 1907, and adjourned April 12th, 1907, and entitled "Taxes—imposing occupation tax on persons,

firms or corporations handling liquors C. O. D." (H. B. 53, Ch. IV), was valid and affected interstate shipments C. O. D. from the State of Missouri to the State of Texas.

The validity of said section was denied and drawn in question by the respondent, Abram Rosenberger, on the ground of its being repugnant to and in contravention of section 8, and section 10, of Article I, of the Constitution of the United States.

Said errors are more particularly set forth as follows:

The Supreme Court of Missouri erred in holding and deciding:

1. That said statute of Texas of February 12, 1907, was a valid enactment of the legislature of said state, insofar as it affected, applied to or controlled interstate C. O. D. shipments of original packages of liquor shipped from the State of Missouri to the State of Texas, and was not repugnant to or in contravention of either section 8 or section 10 of Article I of the Constitution of the United States.

2. That said act of the State of Texas of February 12, 1907, was a valid police regulation of the State of Texas and was not repugnant to or in contravention of either section 8 or section 10 of Article I of the Constitution of the United States and was, therefore, a legal excuse for the refusal of respondent, Pacific Express Company, to comply with its obligations and undertakings to and with respondent, Abram Rosenberger, to carry from Missouri and deliver in Texas original packages of liquor and collect the cost price thereof on delivery, the said appellant, Pacific Express Company, having received such packages from respondent, Abram Rosenberger, in Missouri and having agreed in Missouri to carry them from the state of Missouri to the state of Texas and to deliver the same, in Texas, to the consignees thereof (who had purchased the same in Missouri) on the payment of the purchase price thereof by such consignees; such obligations and undertakings having been assumed by appellant, Pacific Express Company, prior to the passage of such Texas statute.

3. That the trial court properly admitted in evidence the said statute of the state of Texas of February 12th, 1907, and did not err in overruling the objection of respondent that said statute was in contravention of section 8 of Article I of the Constitution of the United States.

4. In not holding that said statute of Texas of February 12, 1907, is an unwarranted attempt to regulate interstate commerce and is violative of section 8 of Article I of the Constitution of the United States.

5. In reversing the judgment in favor of respondent, whereby the erroneous rulings aforesaid were made.

For which errors the respondent, Abram Rosenberger, prays that the said judgment of the Supreme Court of the State of Missouri, of to-wit: May 20, 1914, be reversed and that a judgment be rendered in favor of respondent, Abram Rosenberger, and for costs.

FRANK F. ROZZELLE,
J. J. VINEYARD,
A. F. SMITH,
Attorneys for Abram Rosenberger.

5½ [Endorsed:] In the Supreme Court of the State of Missouri. No. 16,502. Abram Rosenberger, respondent, vs. Pacific Express Company, appellant. Assignment of errors and prayer for reversal. Filed July 14, 1914. J. D. Allen, clerk.

6 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the Supreme Court of the State of Missouri before you or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Abram Rosenberger and Pacific Express Company, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, a state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Abram Rosenberger, as by his complaint, appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the supreme court of the United States, together with this writ, so that you have the same at Washington on the 13th day of August,

7 1914, in the said supreme court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 14th day of July, in the year of our Lord, One Thousand Nine Hundred and Fourteen.

[Seal of the United States District Court, Central Division, Western District of Missouri.]

JOHN B. WARNER,
Clerk of the District Court of the United States for the Central Division of the Western District of Missouri.
By H. C. GEISBERG,
Deputy Clerk.

Allowed July 14, 1914.

HENRY LAMM,
Chief Justice Supreme Court of Missouri.

7½ [Endorsed:] In the Supreme Court of the State of Missouri. No. 16,502. Abram Rosenberger, respondent, vs. Pacific Express Company, appellant. Writ of error. Filed Jul- 14, 1914. J. D. Allen, clerk.

8 In the Supreme Court of the State of Missouri.

No. 16502.

ABRAM ROSENBERGER, Plaintiff in Error,
vs.
PACIFIC EXPRESS COMPANY, Defendant in Error.

Bond.

Know all men by these presents, That we, Abram Rosenberger, as principal, and Royal Indemnity Company (a corporation duly qualified to act as surety on bonds in the State of Missouri), as surety, are held and firmly bound unto Pacific Express Company, in the sum of Two Hundred ($200.) Dollars, to be paid to the said Pacific Express Company, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 13th day of July, 1914.

Whereas, the above-named plaintiff in error seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Missouri.

Now, therefore, the condition of this obligation is such, that if the above-named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

ABRAM ROSENBERGER, *Principal.*
ROYAL INDEMNITY COMPANY,
By R. L. STEWART, *Att'y in Fact,*
Surety.

Attest:

——— ———.

Bond approved, and to operate as a supersedeas.
Dated July 14, 1914.

HENRY LAMM,
Chief Justice Supreme Court of Missouri.

O. K.
I. N. WATSON.

9 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Pacific Express Company, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Missouri, wherein Abram Rosenberger is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Justice of the Supreme Court of the State of Missouri, this 14 day of July, 1914.

HENRY LAMM,
Chief Justice Supreme Court of Missouri.

Attest:
J. D. ALLEN,
Clerk Supreme Court of Missouri.

Kansas City, Mo., July 14th, 1914.

I, attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

I. N. WATSON,
Attorney for Pacific Express Company.

9½ [Endorsed:] In the Supreme Court of the State of Missouri. No. 16,502. Abram Rosenberger, respondent, vs. Pacific Express Company, appellant. Citation. Filed Jul- 14, 1914. J. D. Allen, clerk. Rozzelle, Vineyard and Thacher, attorneys at law.

10 In the Supreme Court of the United States.

ABRAM ROSENBERGER, Plaintiff in Error,
vs.
PACIFIC EXPRESS COMPANY, Defendant in Error.

Order of Enlargement of Time for Docketing this Case and Filing the Record Thereof.

For good cause shown, the time for docketing the above entitled case and filing the record thereof with the Clerk of the Supreme Court of the United States is hereby extended to Thursday, the first day of October, 1914.

HENRY LAMM,
Chief Justice of the Supreme Court of Missouri.

10½ [Endorsed:] #16,502. In the Supreme Court of the United States. Abram Rosenberger, plaintiff in error, vs.

Pacific Express Company, defendant in error. Order of enlargement of the time for docketing this case and filing the record thereof. Filed Aug. 4, 1914. J. D. Allen, clerk. Rozzelle, Vineyard and Thacher, attorneys at law.

11 Be it remembered, that on the 63 day of the regular March Term, 1909, of the Circuit Court of Jackson County, Missouri, at Independence, the same being the 15 day of May, A. D. 1909, the following proceedings were had and made of record before the Honorable Walter A. Powell, Judge of the Independence Division, in words and figures as follows, to-wit:

17855.

ABRAM ROSENBERGER, Plaintiff,
vs.
THE PACIFIC EXPRESS COMPANY, a Corporation, Defendant.

Now on this day comes plaintiff, in person and by attorney, and defendant appears by its attorney. This cause now coming on for trial a jury having heretofore — waived, is submitted to the Court upon the pleadings, and after hearing the evidence, and the arguments of counsel for the respective parties, and being fully advised in the premises, the Court finds the issues for the plaintiff and assesses his damages at the sum of $801.30. It is therefore ordered and adjudged by the court that the plaintiff have and recover of and from the defendant the said sum of Eight Hundred and One Dollars and thirty cents, ($801.30) with interest thereon from and after this date at the rate of six per cent per annum until paid, together with all costs herein and have hereof execution.

Be it remembered, that on the 26th day of the regular June Term, 1909, of the Circuit Court of Jackson County, Missouri, at Independence, the same being the 7th day of July, A. D. 1909, the following proceedings were had and made of record before the Honorable Walter A. Powell, Judge of the Independence Division, in words and figures as follows, to-wit:

17855.

ABRAM ROSENBERGER, Plaintiff,
vs.
PACIFIC EXPRESS COMPANY, Defendant.

Defendant files application and affidavit for appeal to the Supreme Court of this State. The Court refuses to grant appeal to the
12 Supreme Court, but grants appeal to the Kansas City Court of Appeals. Defendant is given until on or before December 1st, 1909, in which to file its bill of exceptions.

Defendant files bond in the sum of $2,000.00 with H. W. Walker and Eli Lewis as sureties. Bond approved.

STATE OF MISSOURI,
County of Jackson:

I, Oscar Hochland, Clerk of the Circuit Court, within and for the County and State aforesaid, do hereby certify that the foregoing is a full, true and complete copy of the order allowing appeal in the case entitled Abram Rosenberger, Plaintiff against Pacific Express Company, Defendant, as the same now appears in my office.

In witness whereof, I hereunto set my hand and affix the seal of said Circuit Court at office in Independence, this 10th day of July, A. D. 1909.

[SEAL.]

OSCAR HOCHLAND, *Clerk*,
By E. C. HAMILTON, *Deputy*.

13 In the Kansas City Court of Appeals, October Term, 1910, October 12th, 1910.

ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Appeal from Jackson Circuit Court.

Now at this day the Court having fully considered Appellant's motion to transfer the said cause to the Supreme Court of Missouri, doth consider and adjudge that said motion be and the same is hereby sustained, because in said cause is involved a construction of the Constitution of the United States in that a statute of the State of Texas is claimed to be constitutional and valid by Appellant and the same statute is claimed to be unconstitutional and void and in violation of the Constitution of the United States by Respondent. It is therefore ordered that said cause be certified to the Supreme Court for the above reasons, for its determination.

I, L. F. McCoy, Clerk of the Kansas City Court of Appeals, do hereby certify that the foregoing is a full, true and complete order of the Court transferring the above styled cause to the Supreme Court, as fully as the same appears of record.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, done at office in Kansas City, Missouri, this 24th day of October, A. D. 1910.

[SEAL.]

L. F. McCOY, *Clerk*,
By C. V. GARNETT, *D. C.*

14 ABRAM ROSENBERGER, Respondent (Plaintiff in Error),
vs.
PACIFIC EXPRESS COMPANY, Appellant (Defendant in Error).

This case and the case of Abram Rosenberger v. Wells Fargo and Company involve the same questions, were tried together by agreement of parties in the Circuit Court of Jackson County, Missouri, and by agreement of parties were argued together in the Supreme

Court of Missouri and were decided together by that court. Since the decisions of the cases in the Supreme Court of Missouri, the parties in the case of Abram Rosenberger v. Wells Fargo and Company have stipulated and agreed that the judgment in said case shall abide the decision in the above entitled case.

15 In the Kansas City Court of Appeals, October Term, 1910.

No. 9242.

ABRAM ROSENBERGER, Respondent,
vs.
WELLS FARGO & COMPANY, Appellant.

No. 9243.

ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Appellants' Joint Abstract of the Record.

These causes were begun in the Circuit Court of Jackson County, Missouri, at Independence, on the first day of April, 1907, by the filing of plaintiff's petitions, which are in words and figures as follows, omitting caption and signatures, to-wit:

16 *Petition in Pacific Express Company Case.*

Plaintiff states that he is now, and at all times herein mentioned, has been doing business under the trade name of the Penwood Company; that defendant is and was at all times herein mentioned, a corporation and liable to be *used* as such in the courts of this state; that defendant is and was at all said times an express company and is and was at all said times a common carrier of goods for hire between Kansas City, Missouri, and various points in the State of Texas; that at sundry times between the 12th day of January, 1907, and the 12th day of February, 1907, plaintiff, at said Kansas City, delivered to defendant and defendant received certain goods, to-wit: Certain packages containing intoxicating liquors, which said packages defendant agreed for and in consideration of certain charges paid to it by plaintiff well and safely to carry from said Kansas City to certain points in the State of Texas designated on said packages respectively, and at the destination thereof to deliver the same to the respective consignees thereof. Said goods are described in the following list which shows the particulars of each shipment, to-wit: The date upon which each of said packages was delivered to said defendant, and the name of each consignee the destination of each of said packages, said destination being in each instance in the

State of Texas, the quantity of liquors in each package, and the amount of the express charges paid by plaintiff to defendant on each of said packages, said list being as follows:

(Here follows a long list of separate shipments, all to points in Texas, as to the correctness and value of which there is no controversy.)

That on or about the 12th day of February, 1907, while the said goods, which were then of the value of $829.30, were the property of plaintiff and while plaintiff had the right to the possession of the same, defendant then being in possession of said goods, wilfully, wantonly and wrongfully converted the said goods to its own use and disposed of the same, to plaintiff's damage in the sum of Eight Hundred Twenty-nine and 30/100 Dollars ($829.30).

Wherefore, plaintiff prays actual damages from defendant in the sum of Eight Hundred Twenty-nine and 30/100 Dollars ($829.30), together with interest thereon at the rate of six per cent. per annum, from April 1st, 1907, the date of filing this petition, and punitive damages in the sum of Eight Hundred Twenty-nine and 30/100 Dollars ($829.00), together with his costs in this behalf expended.

17 The defendant, Pacific Express Company, on the 24th day of March, 1909, filed its amended answer to plaintiff's petition, which, omitting caption and signatures, is as follows, to-wit:

Amended Answer.

Comes now defendant in the above entitled cause and for its amended answer to plaintiff's petition, states:

I.

Defendant denies each and every allegation in said petition contained.

Wherefore, having fully answered, defendant prays to be discharged with its costs.

II.

Further answering, defendant states that at the times mentioned in plaintiff's petition, defendant received from plaintiff certain shipments of liquor to be carried and delivered C. O. D. to certain consignees in the State of Texas; that by the terms, C. O. D., is meant that defendant was to collect from said consignees the purchase price of said consignments of liquors, together with the express charges thereon, which had been previously paid by the plaintiff, and return said purchase price and express charges to the plaintiff, that defendant is not now able to state whether said consignments and the amounts thereof are correctly stated in plaintiff's petition or not, but defendant states that delivery of each and every consignment mentioned in plaintiff's petition, which was actually entrusted to defendant for shipment, was prevented by course of law

enacted on February 12th, '07, by the Legislature of Texas, and it was thereby rendered unable to make lawful delivery of said consignments of liquor to the consignees; only on collection of said C. O. D. charges, that after defendant was so prevented from making deliveries of said liquors, it promptly brought the same back to Kansas City, where the consignments were originally received from the plaintiff and tendered the same to plaintiff, but plaintiff refused to receive or accept the same and that defendant has been obliged by reason there to keep said liquors in its possession and it now hereby tenders all of said liquors which have not, by reason of their own inherent defects, been destroyed, to the plaintiff.

Wherefore, having fully answered, defendant prays to be discharged with its costs.

Plaintiff's reply to defendant, Pacific Express Company's answer, was in the nature of a general denial.

18 *Record Entries.*

These causes were tried at the March Term, 1909, in the Circuit Court of Jackson County, Missouri, at Independence, before the Honorable Walter A. Powell, Judge, a jury having been waived in each of the cases by stipulation of the parties. The trial of the Pacific Express Company case began on the 24th day of March, 1909, and during the trial of said cause, the following stipulation was entered into by and between the parties, to-wit:

"For the purpose of expediting the trial of above causes and to obviate the necessity of making two records, it is hereby stipulated that the above entitled suits may be consolidated and tried together as one action, but separate judgments shall be entered in favor of or against each defendant and any evidence introduced by any party and applicable solely to one defendant shall not be considered for or against the other defendant."

This stipulation was executed by plaintiff and by each of the defendants in each of said causes and was filed in each of said causes and record entry duly made of the filing of said stipulation in each cause on the 26th day of March, 1909. The trial of the Pacific Express Company case was completed on the 26th day of March, and was taken under advisement by the court, and the court proceeded with the trial of the Wells Fargo Express Company case on said 26th day of March.

The trial of said Wells Fargo & Company case being finished, the court took the same under advisement and thereafter, and to-wit, on May 15th, 1909, and during said March term, 1909, the court, after hearing the evidence and the arguments of counsel for the respective parties, and being fully advised in the premises, found the issues for the plaintiff and against the defendant Pacific Express Company, and rendered judgment for plaintiff in said cause for the sum of Eight Hundred One Dollars and Thirty Cents ($801.30), and record entry duly made of such judgment, in said cause, and at the same time the court rendered judgment in favor

of the plaintiff and against the defendant, Wells Fargo &
19 Company, for the sum of One Thousand Five Hundred Seventeen Dollars and Forty-five Cents ($1,517.45), and record entry duly made of such judgment in said cause.

On May 19, 1909, and during said March Term, 1909, and within four days after judgment, the defendant in each of said causes filed its motion for a new trial and record entry was duly made of said filing of said motions in each of said causes.

On June 23, 1909, and at the next term of said court, being the June, 1909, Term of said Court, defendants' motions for new trial in each of said causes were overruled, to which action of the court in overruling said motions, the defendants in each of said causes excepted at the time and judgment was rendered in favor of the plaintiff and against the defendant in the Pacific Express Company case in the sum of Eight Hundred One Dollars and Thirty Cents ($801.30), and costs, and in the Wells Fargo & Company case in the sum of One Thousand Five Hundred Seventeen Dollars and Forty-five Cents ($1,517.45), and costs, and record entries were duly made of such orders in each of said causes.

On July 27, 1909, and during said June Term, 1909, of said court, the defendant, Pacific Express Company, filed its application and affidavit for appeal to the Supreme Court of the State of Missouri, and at the same time and on said date the defendant, Wells Fargo & Company, filed its application and affidavit for appeal to the Supreme Court of the State of Missouri, the court refusing to grant an appeal to the Supreme Court, but granted the appeal in each case to the Kansas City Court of Appeals. To the action of the court in refusing to allow the appeal of said causes to the Supreme Court defendants in each of said causes excepted at the time and record entry duly made of such exceptions at the time.

20 The court on the same day granted and allowed defendant, Pacific Express Company, until on or before December 1, 1909, in which to file its bill of exceptions, and the court on the same day granted and allowed defendants, Wells Fargo & Company, until on or before December 1, 1909, within which to prepare and file its bill of exceptions.

On the same day the defendant, Pacific Express Company, filed its appeal bond in the sum of Two Thousand Dollars ($2,000.00), which was approved by the court and filed.

The court at the same time and on the same day in the Wells Fargo & Company case fixed the amount of the appeal bond in the sum of Three Thousand Five Hundred Dollars ($3,500.00), and record entries were duly made of such orders, and filings in each of said causes.

Thereafter, within the time allowed, defendant, Wells Fargo & Company, filed its appeal bond, which was approved by the court.

At the next term of the court, being the September Term, 1909, and on the 29th day of November, 1909, and within the time allowed by the court within which to prepare and file their bill of exceptions, the defendant in each of said causes filed its application

to have the time for filing its bill of exceptions extended and on said 29th day of November, 1909, by order entered of record in pursuance of stipulation of parties, and for other good cause shown, the court extended the time for filing defendant's bill of exceptions until on or before the 12th day of March, 1910, and record entry was duly made of such order in each of said causes.

On March 9th, 1910, and during the December Term, 1909, of said court, and within the time allowed by the court within
21 which to prepare and file their bill of exceptions, the defendant in each of said causes filed its application to have the time for filing its bill of exceptions extended and on said 9th day of March, 1910, by order entered of record in pursuance of stipulation of parties and for other good cause shown, the court extended the time for filing defendant's bill of exceptions until on or before June 4, 1910, and record entry was duly made of said order in each of said causes at said time.

On May 23rd, 1910, and during the March Term, 1910, of said court, and within the time allowed by the court within which to prepare and file their bill of exceptions, the defendant in each of said causes filed its application to have the time for filing its bill of exceptions extended and on said 23rd day of May, 1910, by order entered of record in pursuance of stipulation of parties and for other good cause shown, the court extended the time for filing its bill of exceptions until on or before the first day of July, 1910, and record entry was duly made of such order in each of said causes at said time.

On June 27th, 1910, and during the June Term, 1910, of said court, and within the time allowed by the court within which to prepare and file their bill of exceptions, the defendant in each of said causes filed its application to have the time for filing its bill of exceptions extended and on said 27th day of June, 1910, by order entered of record, in pursuance of stipulation of parties, and for other good cause shown, the court extended the time until on or before September 10, 1910.

On September 9, 1910, and within the time allowed by the court within which to prepare and file their bills of exceptions, the defendant and each of them presented to the court their bills
22 of exceptions, which said bills of exceptions were by the Honorable Walter A. Powell, Judge of the Circuit Court, wherein said causes were pending, and said proceedings were had, and before whom said causes were tried, examined, approved, signed and sealed and ordered to be filed and made a part of the record in said causes, which was accordingly done on the 9th day of September, 1910, and record entry of said proceedings duly made in each of said causes at said time. Said bills of exceptions are in words and figures as follows, to-wit:

In the Circuit Court of Jackson County, Missouri, at Independence, March Term, 1909.

No. 17855.

A. ROSENBERGER, Plaintiff,
vs.
PACIFIC EXPRESS COMPANY, Defendant.

Be it remembered, That on Wednesday, the 24th day of March, 1909, and at said March Term of said Circuit Court, the above entitled cause coming on to be heard before the court, Honorable Walter A. Powell, Judge, presiding, and a jury having been waived by stipulation, plaintiff appearing by Rosenberger, Taylor & Reed, his attorneys, and defendant appearing by Douglass & Watson, its attorneys, the following proceedings were had:

Plaintiff, to sustain the issues upon his part, offered evidence as follows:

Mr. Watson: The statement in there that charges were prepaid means only charges for going, not the return charges.

Mr. Rosenberger: Let the record show, to avoid any question as to the proper means of getting the stipulation in the record, that the stipulation just read is offered in evidence, stipulation between counsel dated February 13th, 1908.

Said paper was here marked by the stenographer Exhibit
23 "I," and is in words and figures as follows, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Independence, December Term, 1907.

No. 17855.

A. ROSENBERGER, Plaintiff,
vs.
PACIFIC EXPRESS COMPANY, Defendant.

Stipulation.

For the purposes of the trial of this cause, it is stipulated as follows:

That from time to time during the period commencing January 12th, 1907, and ending February 11th, 1907, both inclusive, the plaintiff, at Kansas City, Missouri, delivered to the defendant express company for shipment C. O. D., and defendant received at Kansas City, Missouri, for shipment, C. O. D., to certain points in the State of Texas, certain packages containing intoxicating liquors; that the express charges on each package were in each instance prepaid by the plaintiff; that the date of each shipment, the names of the consignees, the destination of each shipment, the

quantity of liquor in each package, the price of each consignment to be collected by the defendant on the delivery thereof from the respective consignees, and the amount of the express charges prepaid on each shipment are correctly set forth in plaintiff's petition. No contention is made by the defendant that any of said shipments were made by plaintiff otherwise than pursuant to and in accordance with bona fide orders received and accepted at Kansas City, Missouri, by plaintiff from the respective consignees, residents of the towns to which said packages were consigned respectively as aforesaid. Each of said packages was forwarded by defendant to its destination in the State of Texas, and arrived there in the usual course of transportation without undue delay.

It was the usual and regular course of business of defendant at all times herein mentioned to send written notices properly
24 stamped and addressed, to all consignees of arrival of express matter consigned to them. This course of business was carried out with respect to the shipments mentioned in plaintiff's petition.

Until February 12th, 1907, the defendant, through its local agents in Texas at point of destination stood ready and was willing to deliver to all such consignees of intoxicating liquor who might call at the destination office of defendant and pay or tender the proper charges thereon all such liquor which had been shipped to them C. O. D., but after said date, to-wit, February 12th, 1907, defendant refused to deliver C. O. D. anywhere in the State of Texas intoxicating liquors shipped C. O. D. to any person under any conditions or circumstances whatsoever, and on said February 12th, 1907, defendant wholly ceased to deliver to any one in the State of Texas, any such liquor shipped C. O. D. whether the consignee thereof paid or tendered the proper charges on such shipment or otherwise.

On said date, to-wit, February 12th, 1907, all of the local agents of defendant in Texas received from defendant instructions by telegraph to thereafter withhold and refuse delivery to the consignees thereof of all packages of intoxicating liquors shipped C. O. D. and on hand at their respective offices or in transit thereto, including the packages described in plaintiff's petition, and said instructions were obeyed by said agents of defendant. Said instructions to cease and discontinue the delivery of liquor shipped C. O. D., so given to defendant's local agents in Texas, were promulgated by defendant on February 12th, 1907, as a standing rule and regulation, effective immediately, and were made known to the public at large, including the persons to whom the packages mentioned in the petition had been consigned, and if after said date any of the consignees of said liquor, mentioned in plaintiff's petition, had called at the proper office of defendant and had tendered the defendant the proper C. O. D. charges on the liquor shipped to him, and had offered to accept the same, delivery thereof C. O. D. would have been refused by defendant.

25 At the time defendant ceased and discontinued the delivery of liquor shipped C. O. D. in the State of Texas, on February 12th, 1907, as aforesaid, all of the packages of liquor de-

scribed in plaintiff's petition were either on hand at defendant's destination office, in Texas, or were in transit thereto.

Either party to this cause shall have the right to object at the trial to the competency, materiality or relevancy of any of the matters hereinabove set forth, and shall have the right to introduce other and additional evidence not inconsistent with the foregoing statement.

J. C. ROSENBERGER,
Attorney for Plaintiff.
I. N. WATSON,
Attorney for Defendant."

Dated, February 13th, 1908.

On the trial of case No. 17855, Abram Rosenberger v. Pacific Express Company and case No. 17856, Abram Rosenberger v. Wells Fargo & Company, in the Circuit Court of Jackson County, Missouri, at Independence, on, to-wit, March 24, 1909, and the days immediately following, the parties entered into the following stipulation:

"For the purpose of expediting the trial of the above cause and to obviate the necessity of making two records, it is hereby stipulated that the above entitled suits may be consolidated and tried together as one action, but separate judgments shall be entered in favor of or against each defendant and any evidence introduced by any party and applicable solely to one defendant shall not be considered for or against the other defendant."

This stipulation was executed by the plaintiff and by each of the defendants in each of said actions.

26 ABRAM ROSENBERGER, plaintiff, called as a witness in his own behalf, having been duly sworn, testified as follows:

Direct examination by Mr. Rosenberger:

Q. State your name, please?
A. Abram Rosenberger.
Q. Where do you reside?
A. Kansas City, Missouri.
Q. What business are you engaged in?
A. I am in the liquor business. I am a distiller and a liquor dealer.
Q. Have you a distillery?
A. Yes, sir.
Q. Where is your place of business?
A. My distillery is at Liberty, Missouri; my place of business is at Kansas City, Missouri.
Q. How long have you been in business in Kansas City?
A. Eleven years.
Q. I call your attention to the list of liquor shipments set out in the petition in this case, and referred to in the stipulation offered as Exhibit No. 1, and will ask you to state whether or not these shipments were made by you pursuant to written orders received from the persons to whom these liquors were sent.

A. The shipments were all made pursuant to orders received in the mail from the persons to whom the liquors were sent.

Q. Where were these orders received by you?

A. At my place of business in Kansas City, Missouri.

Q. Where did you accept the orders?

A. In Kansas City, Missouri.

27 Q. You may state whether the orders for these liquors from the respective purchasers of the same called for the amount of liquor which was sent in these shipments that are mentioned in your petition.

A. The shipments were made exactly in accordance with the request for shipment made by the parties who ordered the same, yes.

Q. Now, it is admitted in this case by the agreed statement of facts or stipulation Exhibit No. 1 that all of the packages of liquor that are mentioned in the petition were received by the defendant express company, and that the express charges for carrying the liquors down to Texas were paid by you on each shipment, as set out in your petition. When you delivered these liquors to the defendant express company, did the express company give you any receipt for the liquors?

A. Yes, the express company's receipt. The express company receipted for the shipments.

Mr. Rosenberger: Mr. Watson, we have here in the court room all of the original receipts that the express company delivered to Mr. Rosenberger covering these shipments in question. You don't want to encumber the record with all those originals?

Mr. Watson: I have not looked them over, but if the witness says they are all made to those firms, I am not asking that the record be encumbered.

Q. Is the paper which I hand you the form of the receipt which was, in each instance, signed by the defendant express company, at the time you delivered the liquors to the defendant for shipment to Texas?

A. This was the form employed at all times in those shipments.

Q. And were those receipts signed by the express company?

A. Signed by the express company, or their agent, the man who received the goods from our place, the man who was in the employ of the express company.

Q. Where were those receipts delivered to you?

A. At my place of business.

Q. Your store?

A. Yes, sir.

Q. The Pennwood Company was the name under which you were transacting your business, was it not?

A. Yes.

Q. It was not a corporation?

A. Not a corporation.

Q. It was a mere trade name?

A. It was a mere trade name.

Q. At the time that the receipts were delivered to you by the express company, covering the shipments that are here in question, had they furnished you with a form of their regular form of receipt?

A. Yes, we had some in our office.

Q. I will ask you to state whether this is the form with
28 which you had been provided by the defendant as their regular form of receipt.

A. Yes, this is the regular form of receipt that was provided me.

Mr. Rosenberger: It is handed to the stenographer for identification, and is offered in evidence.

Said paper was here marked by the stenographer Exhibit "17," and is in words and figures as follows, to-wit:

"Read the conditions of this receipt.

The Pacific Express Company.

KANSAS CITY, MO.,.....190–.

Not Negotiable.

Received of .....

.....said to contain.....

Value asked and.....given as.....Dollars,

(If value is not given, shipper agrees that the value thereof does not exceed Fifty Dollars).

Marked .....

.....

Which the Company undertakes to carry, but not beyond its own lines, subject to the following conditions, and which conditions are agreed to by the shipper or owner in accepting this receipt.

1. In consideration of the charges therefor, the said Pacific Express Company undertakes to carry the same to the point of destination above designated, if such destination be located on its own lines, but if such destination be located beyond the lines of the Pacific Express Company, then it agrees to deliver the same to its next connecting carrier to be forwarded under the rules and regulations of, and subject to the conditions prescribed by such connecting carrier, and in so delivering the same it is agreed that the Pacific Express Company shall act as the agent only of the shipper.

2. If the destination of this shipment is beyond the lines of the Pacific Express Company and the shipper has advanced the charges thereon to such destination, it is understood and agreed by the shipper or owner that the money so advanced to the Pacific Ex-
29 press Company in excess of its charges is accepted by it for the convenience and as the agent of the shipper, and which, as such agent, it agrees to turn over to the connecting carrier who may undertake to forward the property shipped to said destination in payment of the charges to such connecting carrier.

3. This company is not to be held liable for any loss or damage except as forwarders only, nor for any loss, damage or delay, by the

dangers of navigation, by the act of God, or of the enemies of Government, by the restraints of Government, mobs, riots, insurrections, pirates, or from or by reason of any of the hazards or dangers incident to a state of war.

4. Nor shall this Company be liable for any default or negligence of any person, corporation or association to whom the above described property shall or may be delivered by this Company, for the performance of any act or duty in respect thereto, and any such person, corporation or association, is not to be regarded, deemed or taken to be the agent of this Company for any such purpose, but, on the contrary, such person, corporation or association shall be deemed and taken to be the agent of the person, corporation or association from whom this Company received the property above described. It being understood that this Company relies upon the various Railroad and Steamboat lines of the country for its means of forwarding property delivered to it to be forwarded, it is agreed that it shall not be liable for any losses or damages caused by the detention of any train of cars or of any steamboat or other vehicle upon which said property shall be placed for transportation; nor by the neglect or refusal of any railroad company, steamboat or other transportation line to receive and forward the said property. Nor shall this Company be liable for any losses or damages caused by the detention of said property due to Customs Regulations.

5. It is further agreed this Company is not to be held liable or responsible for any loss of, or damage to, said property or any part thereof from any cause whatever, unless in every case the said loss or damage to be proved to have occurred from the fraud or gross negligence of said Company or its servants; nor in any event shall this Company be held liable or responsible, nor shall any claim be made upon it beyond the sum of Fifty dollars, unless the just and true value thereof is stated herein, and an extra charge is paid or agreed to be paid therefor, based upon such higher value; nor upon any property or thing unless properly packed and secured for transportation; nor upon any fragile fabric, or any fabrics consisting of, or contained in, glass.

6. If any sum of money beside the charges for transportation is to be collected from the consignee on delivery of the above described property and the same is not paid, or if in any case the consignee cannot be found or refuses to receive such property, or for any other reason it cannot be delivered, the shipper agrees that this Company may return said property to him subject to the conditions of this receipt and that he will pay all charges for transportation, and that the liability of this Company for such property while in its possession for the purpose of making such collection, shall be that of a Warehouseman only.

7. In no event shall this Company be liable for any loss, damage or delay, unless the claim therefor shall be presented to it in writing at this office within ninety days after the date of shipment, in a statement to which this receipt shall be annexed.

8. It is further agreed that this Company shall have the full bene-

fit of any insurance that may have been effected upon or on account of said property.

9. And it is further stipulated and agreed, in consideration of the rate of freight to be charged, that the Pacific Express Company shall not be required to make free delivery of the property above mentioned, to the consignee at any station where no voluntary free delivery service is maintained by said Company; nor at any station where such free delivery service is maintained, beyond the delivery limits established by the Pacific Express Company at the date hereof, unless expressly agreed upon and an additional compensation is paid therefor.

For The Pacific Express Company,

—— ——, *Agent.*

The liability of this Company is limited to $50, unless the just and true value is stated in this Receipt and an extra charge is paid or agreed to be paid therefor, based upon such higher value; and such liability ceases on delivery by this Company of property at nearest point to destination it can carry same. Fragile fabrics and fabrics consisting of, or contained in, glass, at owner's risk."

31 Q. Do you know where these liquors are that you shipped as alleged by you in the petition?

A. I don't know where they are now.

Q. Did the defendant express company ever offer to return these packages of liquor here in question to you?

A. With the exception of the very few which are noted hereon, possibly four or five, the express company's drivers have been down at my place of business and presented their bill for the charges for the return of these shipments to Kansas City, and having in their possession at the time the shipments for which they wanted these charges.

Q. Did you pay these express charges, charged by the express company, the defendant, for bringing these liquors back to Kansas City?

A. I did not.

Q. Upon your refusal to pay those charges what was done with the packages of liquor?

A. The employes of the express company would not leave them at my place, but would reload them upon their wagon and take them away again, wouldn't leave them in my possession.

Q. Were any of these liquors mentioned in your petition returned to Kansas City with your consent, by the express company, the defendant?

A. They were not returned with my consent.

Q. Were you consulted in the matter at all?

A. I was not consulted in the matter.

Q. You say when they were returned, they were returned accompanied with a demand for the express charges for bringing them back to you?

A. In each and every instance demand was made for the money charges for transporting them back to Kansas City.

Q. And after you had refused to pay these return charges on these liquors, you may state whether you made any demand upon the defendant for the return to you of the liquors; that is, after they had been brought back to Kansas City.

A. On several occasions I had conversations with Mr. Lewis, the agent of the Company here, and requested the return of these shipments free of charges.

32 Q. You made a condition, upon receiving them, that they not only knock off return charges, but pay you back the going charges?

A. I didn't make that a condition.

Q. Didn't you state you demanded that?

A. I would, certainly. Had these shipments been delivered to me free of charge, I would have accepted them, but I would also have put in a claim for my outgoing charges upon my shipments, upon which I felt the express company had not rendered service.

Said paragraph 11 is in words and figures as follows, to-wit:

"11. C. O. D. Matter:

(*a*) The letters "C. O. D." and amount to be collected must be plainly marked upon each article with which a bill is sent to be collected on delivery, and a similar entry must be made on the way-bill. If shipper requires collection of charges for return of money, the C. O. D. envelope and package must be plainly marked "C. O. D. $— and return charges," and be so way-billed.

(*b*) Aggregating C. O. D. Matter. When two or more packages are sent to same consignee at the same time, with separate C. O. D.'s, they must not be aggregated; but if one C. O. D. covers two or more packages, they may be aggregated as provided in Rule 7. When a C. O. D. covers two or more packages, the amount of C. O. D. must be marked on each, thus: "C. O. D. $— on 2" or "3," as the case may be.

(*c*) Allow Examination or partial delivery of C. O. D. Matter only when instructions to do so are written or printed on, or enclosed in the C. O. D. envelope accompanying the shipment, or upon subsequent written authority from the shipper endorsed by the

33 agent at shipping point. Agents at shipping points will decline to accept C. O. D. shipments with instructions to allow examination or partial delivery, or to subsequently approve shippers' instructions to such effect until shippers execute a release in legal form, exempting this company and its connections to which the matter may be transferred to complete transportation from all loss incident to such examination or partial delivery. The proceeds of each Partial Delivery must be remitted without delay, subject to the regular charge for paid C. O. D.'s, prepaid or collect, according to instructions on original C. O. D. wrapper. No Partial Delivery shall be made until the total amount of freight charges has been paid.

Provided that Partial Delivery shall not be made when the contents of a package are to be delivered to different parties. When

goods are sent on approval, involving but one payment, proceeds for the articles selected must be remitted in the C. O. D. wrapper, the remainder of the goods to be re-packed and immediately returned to the shipper.

(*d*) The Amount of C. O. D. Bills for C. O. D. shipments Must be Collected at the Time such Shipments Are Delivered to Consignees. Agents are positively prohibited from giving credit on C. O. D. shipments.

(*e*) All Orders to Deliver C. O. D. Goods without collecting C. O. D. must have the approval of the agent of the company at the shipping point.

(*f*) Pay no Attention to Orders Sent Direct by Shippers, and even when sent by express with the agent's approval, if in doubt as to the genuineness of such approval, hold goods until satisfied by proper inquiry before making delivery.

(*g*) When C. O. D. Matter is, by order of shipper, through the agent at point of shipment, delivered without collecting, return the C. O. D. bill and envelope with copy of order enclosed, way-billed free, retaining the original order on file.

(*h*) After a C. O. D. Shipment has been forwarded from
34 shipping point, if shipper requests that the shipment be delivered to another consignee, or that the amount of the C. O. D. be reduced, or that the consignee be relieved of payment of charges, or when the entire amount of the C. O. D. is cut off, the shipping agent will require a fee of 10 cents to be paid before endorsing such instructions; shippers' request must then be way-billed with charge of 10 cents, prepaid; when two Companies are interested in the transaction the 10 cent charge will be divided equally.

(*i*) If C. O. D. Matter is refused or cannot be delivered within 24 hours, the shipper must be immediately notified, and if not disposed of within thirty days of such notice, it may be returned subject to charges both ways. If the shipper, after receiving notice of non-delivery from destination agent, requests that the shipment be held for a further period, it may be granted, but it must not be held longer than 60 days after date of shipment, and forwarding agents are forbidden to make any agreement with shippers to hold the goods for a longer period.

When a C. O. D. shipment is accepted, with instructions from shipper, or subsequently ordered through the agent at shipping point, to be returned in a less period than 30 days, such instructions must be strictly observed. C. O. D. packages that have been forwarded from one point to another, on order of shipper may be held for 30 days from date of re-shipment.

Where goods have been shipped by freight and a Bill of Lading for same sent by express C. O. D., the notice of non-payment shall not be given before the arrival of the goods at destination.

(*j*) C. O. D. Matter, and paid C. O. D.'s returned to shippers, must take the same route and pass through the hands of the same Company or Companies as when originally forwarded, provided, that when a C. O. D. shipment has been re-shipped from the original

lestination to which it was addressed, to another destination, it may e returned to the office at which it originated by the most direct oute.

(*k*) When a C. O. D. is received in transfer and the proceeds are to be returned to an office of the Company collecting other than the point of origin, such proceeds may be returned direct by the Company making the collection.

(*l*) C. O. D.'s and collections between the United States and other ountries. Shippers desiring currency or coin different from that urrent where col-ection is to be made, must write their instructions lainly on C. O. D. bill or collection.

(*m*) Each returned shipment C. O. D. must be charged the same mount as was charged for the outward shipment, except that when vo or more shipments are ordered back by the same shipper, from ie same place, at the same time, such returned packages may be ggregated as provided in Rule 7."

Mr. Watson: I offer in evidence law passed by the legislature of e state of Texas on February 12th, 1907, and found in the General ws of the State of Texas, passed by the State Legislature at its ssion convened January 3rd, 1907, and adjourned April 12th, 907, certified on the part of the state of Texas by L. T. Dashiell, cretary of State.

Said section was here marked by the stenographer Exhibit "21" d is in words and figures as follows, to-wit:

axes—Imposing Occupation Tax on Persons, Firms or Corporations Handling Liquors C. O. D.

H. B. No. 53.

Chapter IV.

Act imposing an annual occupation tax upon each office or place kept and maintained by any person, firm or corporation in this tate at which intoxicating liquors legally deliverable are delivered pon payment of purchase money therefor, providing a penalty or failure to pay such tax, and declaring an emergency.

ection 1. Be it enacted by the Legislature of the State of Texas: Any person, firm or corporation doing business is this State shall, at each office or place kept, operated or maintained by such person, firm or corporation at which intoxicating liquors lly deliverable are delivered upon payment of purchase money refore commonly designated as shipments C. O. D., pay annually each office or place so kept an an-ual occupation tax to the State Texas of five thousand dollars, and any county or any incorpod city or town wherein such office or place is located, may levy annual occupation tax upon such person, firm or corporation ein referred to for each of said offices not to exceed one-half of amount hereby levied by the State, such tax to be due and pay- annually.

Sec. 2. The maintaining or operating such office or offices place or places by any person, firm or corporation in this State without paying the occupation tax required in section one of this Act shall subject such person, firm or corporation so operating and maintaining such office or offices place or places, to pay to the State of Texas the sum of fifty dollars, and to the county and any incorporated city or town in which said offices or places are located, each the sum of fifty dollars for each day such office or offices, place or places may be maintained or operated for each office or place so operated; and the State or county or any incorporated city or town may sue for and recover either jointly or severally, each the said sum, for each day that each of said offices or places may be maintained and operated without prepayment of the aforesaid occupation tax.

Sec. 3. The fact that persons, firms and corporations are doing an extensive business in shipping and delivering intoxicating liquors in this State at their various offices or places on the payment of the purchase money therefor and are paying no occupation tax for such privilege, creates an emergency and an imperative public necessity for the suspension of the Constitutional rule requiring bills to be read on three several days in each house, and that this act take effect from and after its passage, and it is so enacted.

(Note.—The enrolled bill shows that the foregoing act passed the House of Representatives by the following vote, yeas
37 104, nays 3; was referred to the Senate, amended and passed by the following vote, yeas 29, nays 0; the House concurred in Senate amendments by the following vote, yeas 94, nays 4.)

Approved February 12, 1907.

Became a law February 12, 1907."

Mr. Rosenberger: The plaintiff objects to the admission in evidence of this law or statute for the reason that, in so far as it has any application to the liquor shipments here in question, it contravenes Section 8 of Article 1 of the Constitution of the United States, which provides that the Congress of the United States alone shall have power to regulate commerce between the several states, in this, that in so far as sought to be applied to the shipments here in question, the legislation offered lays a burden upon interstate commerce and is therefore void. We object to the admission in evidence of this law for the further reason that even if it were constitutional and valid, which is denied, still there is nothing in its provisions which would justify the defendant for its conduct in this connection in refusing to make these deliveries.

Q. Mr. Lewis, I will ask you to state about how much revenue you derive from lots of these offices in Texas; the revenue from these offices where you deliver C. O. D. packag-s of liquor?

Mr. Rosenberger: I object to this line of testimony for the reason it is incompetent, irrelevant and immaterial, and that, even if it were assumed this legislation were valid, aven if it were assumed it rendered it impossible for the defendant to carry out its contract, that this legislation would still be no justification to the defendant.

The Court: I see the point that you make. Of course, we cannot say at this stage what position the authorities will take, but I might say this, although a company might make a contract to deliver, yet, if the state should make a law prohibiting it after it got there, would the carrier be liable for damages for not delivering something when the state refused to let them deliver it?

Mr. Rosenberger: Our position is that where a carrier has made a contract to carry from one state into another, that it is held to the performance of that contract, notwithstanding legislation of a foreign state has made the performance more expensive or burdensome, or even impossible.

The Court: I will reserve the ruling.

38 And thereafter, and during the said March term, to-wit, on Saturday, May 15, 1909, the Court, under the evidence and declarations of law given by the Court, found the issues in favor of the plaintiff, and judgment entered accordingly; to which action, order and ruling of the Court defendant at the time duly excepted.

And within four days thereafter, and during the said March term, to-wit, on Wednesday, May 19th, 1909, defendant filed its motion for new trial, which said motion is in words and figures as follows, to-wit:

In the Circuit Court of Jackson County at Independence, Missouri.

ABRAM ROSENBERGER, Plaintiff,
v.
PACIFIC EXPRESS COMPANY, Defendant.

Motion for a New Trial.

Now comes defendant within four days allowed by law after verdict herein and moves the court to grant it a new trial herein for the following reasons, to-wit:

39 First. Because the verdict and judgment of the court is against the law, and the evidence and the weight of the evidence.

Second. Because the court erred in admitting illegal, incompetent and irrelevant testimony offered by plaintiff over the objection and exception of the defendant herein.

Third. Because the court erred in excluding legal and competent evidence offered by defendant.

Fourth. Because under the pleadings and evidence the verdict and judgment should have been for defendant and against plaintiff.

Fifth. Because the court erred in giving each and every instruction on behalf of plaintiff.

Sixth. Because the court erred in refusing to give legal instructions asked by defendant and refused by the court and in refusing

to give each and every instruction asked by defendant the court erred against defendant.

Seventh. Because the court erred in giving each and every instruction given by the court upon its own motion, and herein the court erred against defendant.

Eighth. Because the court erred in refusing to give each and every instruction asked by defendant.

Ninth. Because the court erred in refusing to instruct that under the Statute of Texas offered and read in evidence the defendant was relieved from its obligation to collect the C. O. D. charges on said liquor, and was in duty bound to obey said law until declared unconstitutional by some court of competent jurisdiction, and in refusing to give such declarations of law the court did not give full faith and credit to such law of Texas as required by Section 1, of Article 4 of the Constitution of the United States, and herein the court took from defendant its right to protection given by said Provision of the Constitution of the United States and erred against defendant in doing so.

Tenth. Because the court erred in holding that defendant had no right under its contract read in evidence and the Tariff Sheet
40 filed with the Interstate Commerce Commission, and read in evidence to exact any return charges for bringing back the goods in question to Kansas City, and in so holding the court erred in not giving the Inter-State Commerce Law full force and effect as construed by the Supreme Court of the United States and the United States Courts of Appeal, and herein the court denied rights given to it by said Inter-State Commerce Act and its regular tariff sheet fixing its rates.

Eleventh. The court erred in holding that under defendant's published tariff rates on file with the Inter-State Commerce Commission wherein it charged all shippers for returning goods the regular tariff rate therein specified, that defendant had no right to charge its regular published tariff rate for such service, and in so holding the court denied defendant its rights given under said Inter-State Commerce Act, and in effect compelled defendant to return said goods in violation of its printed tariff rates on file with said Inter-State Commerce Commission, and herein the court erred against defendant.

Twelfth. Because the court did not give full faith and credit to the statutes of Texas read in evidence, in this that it did not give said Act of Feb. 12th, 1907, the same force and effect here as said act has in the state of Texas, and in so holding the court denied rights given to it by Sec. 1 of Art. 4, Constitution of United States and a new trial should be granted for such reason.

Thirteenth. Because the court erred in holding defendant had no right to charge for return of plaintiff's packages under its published tariff sheet on file with the Inter-State Commerce Commission at the time said shipment was made and in so holding the court deprived defendant of rights given to it by said Inter-State Commerce Act and in so holding denied to defendant the right to charge for such return service in accordance with said published tariff sheet.

Fourteenth. The court erred in holding the Statute of Texas

passed Feb. 12th, 1907, was not valid and binding on plaintiff and defendant until set aside by a court of competent jurisdiction as unconstitutional and void, and erred in holding the defendant
41 was bound to carry out its contract to collect said charges in violation of said Statute and in so holding the court violated Section 1, Article 4, of Constitution of the United States in that it did not give full force and effect to said law, as it had in the state of Texas, and also deprived defendant of its property without due process of law, because it obeyed said Texas Statute aforesaid, and denied to defendant the equal protection of the laws, in requiring it to deliver and collect C. O. D. charges in violation of said law or be held guilty of conversion in not doing so, and in so holding, it deprived defendant of its property without due process of law, and denied to defendant the equal protection of the laws.

Wherefore defendant prays the court to set aside said verdict and judgment thereon and to grant it a new trial for the reasons above given.

DOUGLASS & WATSON,
Attorneys for Defendant.

And thereafter, and during the June term, to-wit, on Wednesday, June 23rd, 1909, said motion for new trial coming on to be heard, the court, after due consideration thereof, overruled said motion for new trial; to which action, order and ruling of the Court defendant at the time duly excepted.

42 In the Supreme Court of Missouri, Division No. One, October Term, 1913, January 9th, 1914.

16502.

"ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Come now the said parties by Attorney, and after argument herein, submit this cause to the Court."

Thereafter, to-wit, on March 3rd, 1914, the following further proceedings were had and entered of record in said cause:

"ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Appeal from Circuit Court of Jackson County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge

that the judgment aforesaid, in form aforesaid, by said Circuit Court of Jackson County rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment and that the said appellant recover against the said respondent its costs and charges herein expended, and have execution therefor. (Opinion filed.)"

Which said opinion is in words and figures as follows, to-wit:

43 In the Supreme Court of Missouri, April Term, 1914, Div. No. 1.

(No. 16502.)

ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Statement.

This is a suit in conversion.

The facts of this case are undisputed and are briefly as follows:

The plaintiff, at all the times hereinafter mentioned was a wholesale liquor dealer in Kansas City, Missouri, transacting business in the ordinary manner throughout the United States; and the defendant, the Pacific Express Company, a common carrier, was during said times engaged in carrying express matters throughout the United States, and especially from the State of Missouri to the State of Texas.

That shortly prior to February 12th, 1907, the plaintiff delivered to the defendant, express prepaid, certain packages of liquor to be transported by it to the former's customers in the state of Texas; the delivery thereof to be made on the payment of the price thereof, as will be presently stated.

On said February 12th, 1907, the State of Texas duly enacted a statute imposing an occupation tax on all persons and corporations "handling liquors C. O. D." The license or tax imposed by the statute was $5,000 a year at each place maintained for that purpose.

That after the acceptance of said liquors by the defendant and prior to their delivery, said statute went into effect, and the defendant refused to deliver the packages or to collect the price thereof, and after due notice returned the same to the plaintiff at

44 Kansas City, where they offered to deliver them to the plaintiff, upon condition that he pay the return express charges thereon. The plaintiff refused to pay said charges, and to accept said goods, and the defendant now holds the same, as it claims, for the use of the plaintiff.

The plaintiff instituted this suit in the Circuit Court of Jackson County against the defendant for converting said goods to its own use.

The terms and conditions of the contract of carriage and delivery to be subsequently mentioned, made and entered into by and between the plaintiff and defendant was in writing, and expressed in a receipt given to the former by the latter upon the receipt of the goods for shipment.

This receipt is the ordinary one given by express companies to the consignor of goods; and paragraph Six thereof, the one relating to the C. O. D. question involved in this case, reads as follows:

"If any sum of money besides the charges for transportation is to be collected from the consignee on delivery of the above described property and the same is not paid for or if in any case the consignee cannot be found, or for any other reason it cannot be delivered, the shipper agrees that this company may return said property to him subject to the conditions of this receipt, and that he will pay all charges for transportation, etc." By paragraph 3 of the same contract it is also provided that "defendant shall not be liable for any loss or damages by act of God, or of the enemies of government, or by the restraint of government," etc.

That after the taking effect of the Texas statute the defendant notified the plaintiff that if he would release the C. O. D. contract it would deliver the goods to the consignee; this the plaintiff re-
45 fused to do, but insisted on the defendant carrying out its contract of shipment and delivery and that it deliver the packages to the consignee and collect the C. O. D. charges which it refused to do; but upon the contrary ordered its agent to return the liquor to Kansas City, and charged the return express charges to the plaintiff as previously stated.

Opinion.

I.

Counsel for appellant ask for a reversal of the judgment of the circuit court for two reasons; first, because it held that the statutes of Texas, mentioned, was no excuse or justification for the defendant's refusal to deliver the packages mentioned; second, because the undisputed evidence shows that if the defendant is liable to the plaintiff in any manner, it is for a breach of contract and not for a conversion of the goods.

We will dispose of these propositions in the order stated.

Regarding the first: It is confidently insisted by counsel that the Texas statute is a perfect bar to plaintiff's right of recovery in this case.

This insistence is predicated upon the fact that the Court of Civil Appeals, of Texas, in the case of Craddock & Co. v. Wells-Fargo Express Co., 125 S. W. 59, held said statute to be constitutional and valid, and therefore, under the well known rule of law, to the effect that where one agrees to do an act lawful at the time, and subsequently thereto the legislature passes a law making the performance of that act illegal, the contract of performance is thereby annulled. Church v. New York, 5 Cow. 538; Cordes v. Miller 39 Mich. 584; Stone v. Mississippi, 101 U. S. 814. Of course this rule only applies

to contracts and statutes relating to matters embraced within the police power of the state.

Counsel for plaintiff with equal confidence contend, that
46 while the Texas statute may be valid, as a defense to intra-state shipments, like the Craddock case, supra, yet it has no application to interstate shipments like the present case, where the liquor was shipped from one state to another. This class of cases, it is contended, is governed by the interstate commerce clause of the constitution of the United States, and that if the Texas statute is intended to apply to shipments of this character, then it is unconstitutional and void. So, in no event it is insisted, can that statute constitute a bar against plaintiff's right to a recovery in this case. In support of this proposition we are cited to many cases, and among others Adams Express Co. v. Kentucky, 206 U. S. 129; American Express Co. v. Iowa, 196 U. S. 133; Norfolk v. Ry. Co. v. Sims, 191 U. S. 441; Allen v. Pullman Co. 191 U. S. 171. None of these cases involved the phase of the C. O. D. question here presented; and in approaching its consideration it should be borne in mind that the duty to receive, transport and deliver articles of commerce by a common carrier is imposed by law, subject of course to reasonable limitations and regulations, and not by contract; while the C. O. D. question, that is the collection of the purchase price of the articles transported by the carrier at the time of their delivery to the consignee and the return of the purchase price to the consignor by the carrier is a duty imposed by contract, and not by law. In other words, the carrier is under no legal obligation, in the absence of some statute, to collect the puschase price of goods carried without it contracts to so do.

And a breach of the former duty by the carrier is a violation of the law of the state or of the United States, as the case may be, and the law provides a remedy for that wrong; but the breach of the latter, the contractual duty, is the violation of the contract for which the law also provides a remedy, but the two remedies are different, notwithstanding both may have been assumed by the carrier at the same time regarding the same article of commerce.
47 And because of this two-fold duty of the carrier, it is entitled to charge a reasonable sum for transporting and delivering the goods, and an additional and separate sum to be agreed upon by the parties for the collection and return of the purchase price of the goods.

Under this view of the question, I am unable to see from what possible viewpoint it could be considered that the questions (1) of with-holding the delivery of articles of commerce transported by the carrier; (2) the storage of the same until such time (not the reasonable time for their delivery) as the consignee is able and willing to pay for them; (3) and the collection of the purchase price thereof from the latter, has to do with either state or interstate commerce.

Suppose, for instance, that an express company should today receive from me in Jefferson City, Missouri, two boxes of cigars one to be carried to John Smith at St. Joseph, Missouri, and the other to

John Jones in Austin, Texas, and that in pursuance to its ordinary legal duties the company should carry the cigars to their respective points of destination and deliver them within a reasonable time to the respective consignees, would the mere fact that the express company neglected or expressly refused to agree to do the three things before mentioned, interfere in any manner with either state or interstate commerce? It seems to me that it would not, for the simple reason that the performance or nonperformance of all three of those matters rest- solely upon contract, and I know of no law that requires the express company or any other carrier to make or enter into a contract of that kind or for any other purpose.

If this is true, and it seems to me that it is unquestionably so, then how are we in this case going to escape that other well known rule, namely, that the things that are to be performed in the execution of the contract are governed by the law of the State
48 where the contract is to be executed. I am not now speaking of inter-state commerce or any of the things that are incidental to the free and untrammeled transportation and delivery of all articles of commerce. But I am speaking of all contracts affecting the use of all classes of property, whether produced in a State or shipped there from another; or from some foreign country, which, however, as I have tried to state are independent of and do not in any manner interfere with or stifle inter-state commerce, as I tried to show by the supposed case previously stated.

Such a contract would have nothing whatever to do with the transportation and delivery of the cigars within a reasonable time, but would go further and obligate the express company to attach to its duty as a common carrier, to transport and deliver goods within a reasonable time, an additional obligation, (not a duty in a strict sense) to retain and store the same for a period beyond the reasonable time fixed by law for that purpose and thereby and from that time, convert the carrier into a public storage company and collection agency, which would be wholly independent of its duties as a common carrier; and as clearly in violation of the law of Texas as if the goods had been shipped to John Smith, as agent of the consignor, with directions to receive the same from the express company and store the same until the purchaser should call for and pay him the purchase price thereof.

That being unquestionably true, then why would not the storage of the goods and the collection of the purchase price be governed by the laws of the State where they were to be stored and where the money is to be collected.

Suppose again, that instead of cigars, the shipment had consisted of gasoline, gun-powder, dynamite or nitro-glycerine, would it be seriously contended that the laws of Texas would not govern
49 their storage, after the lapse of a reasonable time for its delivery, notwithstanding the agreement of the express company that it would hold the same in its office or store-house for thirty days, or any other time beyond a reasonable time required for its delivery? Certainly not.

Carriers of inter-state commerce, the same as the consignees thereof,

must obey the storage laws of the State where located, and that duty cannot be evaded by the consignor and the carrier, or any one else, entering into a contract obligating itself or himself to retain the goods beyond a reasonable time for their delivery in violation of a State law, in order that the purchaser may have time in which to pay the purchase price.

In other words, a carrier of interstate commerce is equally subject to the ware-house and storage laws of a State as are the ordinary citizens of that State engaged in the storage and warehouse business, and the mere fact that the carrier may see proper to add to its ordinary duties of a common carrier, and additional contractual obligation not to deliver the goods within a reasonable time, will not exempt the carrier from the State laws governing the storage of goods, and the laws thereof governing the collection of debts.

And especially should this be, where the State law relates to the contractual delay duty of delivery of the carrier concerning intoxicating liquors, which all courts in christendom hold is within itself a nuisance, and that the liquor business is also unlawful, except where authorized by statute.

State v. Distilling Co. 236 Mo. 219, where many of the cases, State and Federal, are cited and considered, bearing upon that question.

These suggestions illustrate the principle of law I have in mind, namely, that the storage of goods after their delivery, or after the lapse of a reasonable time for their delivery, is a separate and independent matter from either state or interstate commerce, and
50 is and must be governed by the storage laws of the State where they are located, and as a necessary sequence, the collection of the purchase price of the goods, at least, after the storage period has begun, is and must be governed by the laws of the State where they are located, and the collection is to be made.

While I believe that the Constitution of the United States is the greatest and wisest instrument ever written for the government of a great nation, and especially the commerce clause thereof, of which so much has been said and written, yet I do not believe that its wise and useful purpose was designed for, or should be used as a shield for the protection of designing persons engaged in a business prohibited by the laws of any State, so long as those laws do not in any manner interfer- with the transportation and delivery of articles shipped from one State to another, or from a foreign country. Of course, I am not considering the questions of taxation of articles of importation, etc., but am trying to confine my observations to the single question in hand.

But it has been suggested: Suppose liquors should be shipped today from Kansas City to Austin, Texas, C. O. D., and the contract should be silent as to the time of delivery, which would of course mean a reasonable time, and within that time, the goods should be delivered and the purchase price paid to the carrier?

In answer to that suggestion I would say that no such case is before the court; but by way of obiter I would say that in principle there would be no difference in the two cases, for the reason that the legal duty of the carrier to ship and deliver the goods, and the con-

tract or agreement to collect the purchase price, etc., are not so interdependent as to prohibit the legislature from segregating the former from the latter, and enacting laws in the nature of police regulations regarding the collections.

And no fair minded disinterested man can read this record without reaching the conclusion that the C. O. D. contract men-
51 tioned in this case was resorted to in order to sell intoxicating liquors in the State of Texas in violation of the laws thereof; and in order to meet this evil the statute of 1907 was by the legislature of that State enacted, and not for the purpose of interfering with state or interstate commerce.

It has been suggested that if such a statute is upheld, then the legislature of a state might, under the guise of regulating the storage of property and the collection of money might thereby interfere with and stifle interstate commerce.

In answer to that suggestion, I simply refer the parties to the able, well considered and patriotic opinions in the cases of Express Company v. Kentucky, supra; American Express Co. v. Iowa, supra; and Heyman v. Southern Railway Co., 203 U. S. 270, with the added observations that the Supreme Court of the United States, in the future, as in the past, will never lend countenance to any rule, statute or judicial ruling of any State authorizing the erection of a wall of any kind against free intercourse and the transportation of persons and property from one State to another.

Believing as I do, that said statute does not in any manner operate in restraint of interstate commerce, I am clearly of the opinion that the same is a valid enactment, as was held by the Texas Civil Court of Appeals in the case of Craddock v. Wells-Fargo Express Company, supra.

I am, therefore, of the opinion that when said statute went into effect, it was a valid police regulation and a legal excuse for the defendant's refusal to deliver the liquors and collect the purchase price thereof.

Opinion.

II.

Regarding the second reason assigned by defendant for a reversal of the judgment, namely, that if it is liable at all to the plaintiff, it is not for a conversion of the liquor shipped, but for damages
52 for a breach of the C. O. D. contract, as before defined, for nondelivery of the liquors and not collecting the purchase price thereof, as therein provided.

If we are correct in holding in paragraph One of this opinion that the C. O. D. contract mentioned was separate and independent of the defendant's duty as a common carrier to transport and deliver the packages within a reasonable time, then clearly, under the undisputed evidence that the defendant still has the packages and offers to return them to the plaintiff upon the payment of the express charges from Texas to Kansas City, there could be no conversion.

These facts do not constitute a conversion of the liquors, but a

breach of the C. O. D. contract, which took effect after the def
ant's duty to the plaintiff as a common carrier had terminated.

Entertaining these views I am of the opinion that the judgmen
the circuit court should be reversed; and it is so ordered.

All Concur, exc , Bond, J., and Faris J. who dissents.

A. M. WOODSON,

53 In the Supreme Court of Missouri, Division One.

No. 16502.

ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Motion of Respondent to Transfer Cause to Court En Banc.

Now comes respondent and prays the court that the above enti
cause may be transferred to the court en banc for its decision
states that the above entitled cause was in Division No. One deci
adversely to the respondent; that this application is made pursu
to Section 4, of the Amendment of 1890 of the Constitution of M
souri, which provides that when a federal question is involved,
cause on application of the losing party shall be transferred to
court for its decision; that in this cause the respondent was a wh
sale liquor dealer in Kansas City, Missouri; that appellant wa
common carrier and shipped merchandise for respondent C. O.
to various points in the State of Texas; that the State of Texas
February 12th, 1907, enacted a statute imposing an occupation
on all persons and corporations delivering liquors C. O. D. in
State of Texas; that after the acceptance of said liquor by said
pellant and prior to its delivery in Texas, said statute of Texas w
into effect and the appellant refused to deliver the packages or
collect the price thereof and after due notice returned the same
the respondent at Kansas City where the appellant offered to deli
same to the respondent on the condition that he pay the
54 turn express charges thereon. The respondent refused to p
said charges and accept said goods and sued the appellant
conversion.

That the contracts and obligations of transportation and delive
were in fact interstate commerce contracts and the shipmen
thereunder were interstate shipments and were governed by the Co
stitution and the laws of the United States as prescribed by the Co
stitution of the United States in Article 1, Sections 8 and 10.

That said decision is contrary to and in contravention of Sectio
8 and 10 of Article 1 of the Constitution of the United States.

Wherefore, The respondent, the losing party herein, prays th
the above cause may be transferred to the Court for its decision.

A. F. SMITH,
ROZZELLE, VINEYARD &
THACHER,
Attorneys for Respondent.

In the Supreme Court of Missouri, April 2nd, 1914.

16502.

ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Now at this day the Court having considered and fully understood the motion of the said Respondent for rehearing herein, doth order that said motion be, and the same is hereby overruled. It is further considered and ordered by the Court that the motion of said Respondent to transfer said cause to Court in Banc be sustained and that said cause be and the same is hereby transferred to Court in Banc.

55 In the Supreme Court of Missouri, in Banc, April Term, 1914.

And thereafter, on May 6th, 1914, the following further proceedings were had and entered of record in said cause, to-wit:

16502.

"ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Come now the said parties, by attorney, and after argument herein, submit this cause to the Court, with leave of five days to the said Appellant to file brief and five days thereafter to said Respondent to file reply."

And thereafter, to-wit, on May 20th, 1914, the following further proceedings were had and entered of record in said Court:

"ABRAM ROSENBERGER, Respondent,
vs.
PACIFIC EXPRESS COMPANY, Appellant.

Appeal from the Circuit Court of Jackson County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be reversed, annulled, and for naught held and esteemed, and that the said Appellant be restored to all things which it has lost by reason of the said judgment; and that the said Appellant recover against the said Respondent its costs and charges herein expended, and have execution therefor. (Opinion filed.)"

The Court in Banc adopted the Divisional opinion.

56 In the Supreme Court of the United States.

ABRAM ROSENBERGER, Plaintiff in Error,
vs.
PACIFIC EXPRESS COMPANY, Defendant in Error.

Præcipe.

To the Clerk of the Supreme Court of Missouri:

You are hereby requested and directed to make a transcript of the record to be filed in the Supreme Court of the United States pursuant to a writ of error allowed in the above entitled cause, being case No. 16502 in the Supreme Court of Missouri, and to incorporate (by original or by copy as may be proper) into the transcript of record the following pages and exhibits, to-wit:

1. Insert the petition for a writ of error and order of Honorable Henry Lamm, Chief Justice of the Supreme Court of Missouri, allowing the said writ of error; assignment of errors; the writ of error, bond and supersedeas; citation and entry of appearance, and order for enlargement of time for docketing this case and filing the record thereof.

2. Insert the transcript of judgment of the Circuit Court of Jackson County, Missouri, at Independence, being case Number 17855 in said Circuit Court, and order allowing appeal to the Kansas City Court of Appeals, being the transcript originally filed in said cause.

57 3. Insert the judgment of the Kansas City Court of Appeals transferring said cause to the Supreme Court of Missouri.

4. Insert the following recital:

"This case and the case of Abram Rosenberger v. Wells Fargo & Company involve the same questions, were tried together by agreement of parties in the Circuit Court of Jackson County, Missouri, and by agreement of parties were argued together in the Supreme Court of Missouri and were decided together by that court. Since the decision of the cases in the Supreme Court of Missouri, the parties in the case of Abram Rosenberger v. Wells Fargo & Company have stipulated and agreed that the judgment in said case shall abide the decision in the above entitled case."

5. Insert the following portions of the printed abstract of the record filed in the Kansas City Court of Appeals and transferred to the Supreme Court of Missouri, being the abstract of the record on which the case was heard and determined in the Supreme Court of Missouri:

(*a*) Insert the first paragraph on page 1; also insert beginning with the words on page 3 "Petition in Pacific Express Company case" and continuing through the second paragraph on page 4 ending with the words "together with the costs in this behalf expended."

(*b*) Insert on page 5 the second paragraph, which paragraph

begins with the words "The defendant Pacific Express Company," etc., and continue through page 6 down to the word "Replies."

(*c*) Insert from the record on page 6 the following paragraph: "Plaintiff's reply to defendant Pacific Express Company's answer was in the nature of a general denial."

(*d*) Insert the last paragraph on page 6 of the printed abstract of record beginning with the words "Record Entries" and also insert all of pages 7, 8, 9, 10, 11, 12, 13 and page 14 down to and including the words, "This stipulation was executed by the plaintiff and each of the defendants in each of said actions."

58 (*e*) Insert the testimony of Abram Rosenberger beginning on page 40 of said printed abstract of the record and continuing down to and including all of the testimony on page 41 except the last two lines on page 41; beginning with the third question on page 43 and continuing on down to the end of Exhibit No. 17 as it appears on pages 44, 45, 46 and 47 of said printed abstract of the record; insert the first four questions and answers on page 49; insert the last question and answer on page 50 and the first three questions and answers on page 51; insert the sixth and seventh questions and answers on page 70.

(*f*) Insert paragraph 11 of Exhibit No. 3 and the offer thereof in evidence as the same appears on pages 87, 88, 89 and 90 of said printed abstract of the record.

(*g*) Insert offer by Mr. Watson of Exhibit 21, being the statute of Texas described in the offer thereof in evidence, which offer begins with the words, "Mr. Watson: I offer in evidence law passed by" etc., and also the exhibit itself as it appears on pages 93, 94 and 95 of said printed abstract of the record; also the remaining portion of page 95 and page 96, down to and including the words, "The Court: I will reserve the ruling."

(*h*) Insert the recitation of the abstract of the record showing the finding of the court, defendant's motion for a new trial and the overruling thereof, beginning with the first line of the second paragraph on page 104 of the printed abstract of the record, said first line of said paragraph reading as follows: "And thereafter and during said March Term", and continuing through the first paragraph following said motion for a new trial on page 107 of said printed abstract of the record.

59 6. Insert opinion of the Supreme Court of Missouri in this case.

7. Insert motion filed by Abram Rosenberger, plaintiff in error herein, for the transfer of this case to the Supreme Court of Missouri in banc.

8. Insert order of the Supreme Court of Missouri sustaining the motion to transfer said case to the Supreme Court of Missouri in banc.

9. Insert final judgment of the Supreme Court of Missouri in banc reversing this case.

Insert this recital:

"The court in banc adopted the divisional opinion."

10. Insert this præcipe.

11. Add your certificate.

12. Upon completion of said transcript the clerk of the Supreme Court of Missouri shall file the same with the Clerk of the Supreme Court of the United States.

FRANK F. ROZZELLE,
J. J. VINEYARD,
A. F. SMITH,
Attorneys for Plaintiff in Error.

Due service of the above and foregoing præcipe is hereby acknowledged and accepted this 4th day of September, 1914, for and on behalf of the aforesaid Pacific Express Company, defendant in error in the above entitled cause.

I. N. WATSON,
Attorney for Defendant in Error.

59½ [Endorsed:] In the Supreme Court of the United States. Abram Rosenberger, Plaintiff in Error, vs. Pacific Express Company, Defendant in Error. Præcipe. Filed Sep. 5, 1914. J. D. Allen, Clerk.

60 In the Supreme Court of Missouri.

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the above and foregoing is a full true and correct copy of the proceedings and papers filed in said cause, as fully as called for in the præcipe filed by Plaintiff in Error herein, as fully as the same appear of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the official seal of our said Supreme Court. Done at office in the City of Jefferson, State aforesaid, this 8th day of September, 1914.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk Supreme Court, State of Missouri.

Endorsed on cover: File No. 24,370. Missouri Supreme Court. Term No. 249. Abram Rosenberger, plaintiff in error, vs. Pacific Express Company. Filed September 19th, 1914. File No. 24,370.

No. 249

IN THE

Supreme Court of the United States.

ABRAM ROSENBERGER, PLAINTIFF IN ERROR,

VS.

PACIFIC EXPRESS COMPANY, DEFENDANT IN ERROR.

Motion by Defendant in Error to Dismiss Case for Want of a Federal Question Authorizing a Writ of Error from the Supreme Court of the United States.

I. N. WATSON,
Attorney for Defendant in Error.

J. L. MINNIS, *of Counsel.*
On Briefs.

No. .....

IN THE

reme Court of the United States.

BRAM ROSENBERGER, PLAINTIFF IN ERROR,

VS.

IFIC EXPRESS COMPANY, DEFENDANT IN ERROR.

on by Defendant in Error to Dismiss Case for ant of a Federal Question Authorizing a Writ of Error from the Supreme Court of the United States.

Now comes defendant in error and moves this hon-e court to dismiss the writ of error heretofore l to the Supreme Court of the State of Missouri he following reasons, to-wit:

1. That in the Supreme Court of the State of ouri, the appellant in said case, to-wit, The Pacific ess Company, contended that if it was liable at all r the facts stated in plaintiff's petition and the evi-e it was not for a conversion of the liquor shipped,

but for damages for the breach of the C. O. D. contract for the non-delivery of the liquors and not collecting the purchase price thereof, as therein provided; that the Supreme Court of the State of Missouri passed upon this assignment of error and sustained the same, and rendered an opinion reversing the judgment of the trial court, as follows:

> "Woodson, P. J. (after stating the facts as above).
>
> 1. Counsel for appellant ask for a reversal of the judgment of the Circuit Court for two reasons: First, because it held that the statutes of Texas, mentioned, was no excuse or justification for the defendant's refusal to deliver the packages mentioned; second, because the undisputed evidence shows that if the defendant is liable to the plaintiff in any manner, it is for a breach of contract, and not for a conversion of the goods. We will dispose of these propositions in the order stated.
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> Regarding the first: It is confidently insisted by counsel that the Texas statute is a perfect bar to plaintiff's right of recovery in this case. This insistence is predicated upon the fact that the Court of Civil Appeals of Texas, in the case of *Craddock & Co.* v. *Wells-Fargo Express Co.*, 125 S. W. 59, held said statute to be constitutional and valid, and therefore, under the well-known rule of law, to the effect that where one agrees to do an act lawful at the time, and subsequently thereto the Legislature passes a law making the performance of that act illegal, the contract of performance is thereby annulled. *Church* v. *New York*, 5 Cow. (N. Y.) 538; *Cordes* v. *Miller*, 39 Mich. 584, 33 Am. Rep. 430; *Stone* v. *Mississippi*, 101

U. S. 814, 25 L. Ed. 1079. Of course this rule only applies to contracts and statutes relating to matters embraced within the police power of the state.

Counsel for plaintiff with equal confidence contend that, while the Texas statute may be valid as a defense to intrastate shipments, like the Craddock case, *supra*, yet it has no application to interstate shipments, like the present case, where the liquor was shipped from one state to another. This class of cases, it is contended, is governed by the interstate commerce clause of the Constitution of the United States, and that if the Texas statute is intended to apply to shipments of this character, then it is unconstitutional and void. So in no event, it is insisted, can that statute constitute a bar against plaintiff's right to a recovery in this case. In support of this proposition we are cited to many cases, and, among others, *Adams Express Co.* v. *Kentucky*, 206 U. S. 129, 27 Sup. Ct. 606, 51 L. Ed. 987; *American Express Co.* v. *Iowa*, 196 U. S. 133, 25 Sup. Ct. 185, 49 L. Ed. 424; *Norfolk Ry. Co.* v. *Sims*, 191 U. S. 441, 24 Sup. Ct. 151, 48 L. Ed. 254; *Allen* v. *Pullman Co.*, 191 U. S. 171, 24 Sup. Ct. 39, 48 L. Ed. 134. None of these cases involved the phase of the C. O. D. question here presented; and, in approaching its consideration, it should be borne in mind that the duty to receive, transport, and deliver articles of commerce by a common carrier is imposed by law, subject, of course, to reasonable limitations and regulations, and not by contract; while the C. O. D. question, that is, the collection of the purchase price of the articles transported by the carrier at the time of their delivery to the consignee, and the return of the purchase price to the consignor by the carrier, is a duty imposed by contract, and not by law. In other words, the car-

rier is under no legal obligation, in the absence of some statute, to collect the purchase price of goods carried without it contracts to so do. And a breach of the former duty by the carrier is a violation of the law of the state or of the United States, as the case may be, and the law provides a remedy for that wrong; but the breach of the latter, the contractual duty, is the violation of the contract for which the law also provides a remedy, but the two remedies are different, notwithstanding both may have been assumed by the carrier at the same time regarding the same article of commerce. And because of this twofold duty of the carrier, it is entitled to charge a reasonable sum for transporting and delivering the goods, and an additional and separate sum to be agreed upon by the parties for the collection and return of the purchase price of the goods.

Under this view of the question, I am unable to see from what possible viewpoint it could be considered that the questions: (1) Of withholding the delivery of articles of commerce transported by the carrier; (2) the storage of the same until such time (not the reasonable time for their delivery) as the consignee is able and willing to pay for them; (3) and the collection of the purchase price thereof from the latter—have to do with either state or interstate commerce. Suppose, for instance, that an express company should today receive from me in Jefferson City, Mo., two boxes of cigars, one to be carried to John Smith, at St. Joseph, Mo., and the other to John Jones in Austin, Tex., and that in pursuance to its ordinary legal duties the company should carry the cigars to their respective points of destination and deliver them within a reasonable time to the respective consignees, would the mere fact that the express company neglected or expressly refused to

agree to do the three things before mentioned interfere in any manner with either state or interstate commerce? It seems to me that it would not, for the simple reason that the performance or non-performance of all three of those matters rests solely upon contract, and I know of no law that requires the express company, or any other carrier, to make or enter into a contract of that kind, or for any other purpose. If this is true, and it seems to me that it is unquestionably so, then how are we in this case going to escape that other well known rule, namely, that the things that are to be performed in the execution of the contract are governed by the law of the state where the contract is to be executed. I am not now speaking of interstate commerce, or any of the things that are incidental to the free and untrammeled transportation and delivery of all articles of commerce. But I am speaking of all contracts affecting the use of all classes of property, whether produced in a state or shipped there from another, or from some foreign country, which, however, as I have tried to state, are independent of and do not in any manner interfere with or stifle interstate commerce, as I tried to show by the supposed case previously stated. Such a contract would have nothing whatever to do with the transportation and delivery of the cigars within a reasonable time, but would go further and obligate the express company to attach to its duty as a common carrier, to transport and deliver goods within a reasonable time, an additional obligation (not a duty in a strict sense) to retain and store the same for a period beyond a reasonable time fixed by law for that purpose, and thereby and from that time convert the carrier into a public storage company and collection agency, which would be wholly independent of its duties as a common carrier; and as clearly in violation of the law of Texas as if the

goods had been shipped to John Smith, as agent of the consignor, with directions to receive the same from the express company and store the same until the purchaser should call for and pay him the purchase price thereof. That being unquestionably true, then why would not the storage of the goods and the collection of the purchase price be governed by the laws of the state where they were to be stored and where the money is to be collected?

Suppose, again, that instead of cigars, the shipment had consisted of gasoline, gunpowder, dynamite or nitro-glycerine, would it be seriously contended that the laws of Texas would not govern their storage, after the lapse of a reasonable time for its delivery, notwithstanding the agreement of the express company that it would hold the same in its office or storehouse for 30 days, or any other time beyond a reasonable time required for its delivery? Certainly not. Carriers of interstate commerce, the same as the consignees thereof, must obey the storage laws of the state where located, and that duty cannot be evaded by the consignor and the carrier, or anyone else, entering into a contract obligating itself or himself to retain the goods beyond a reasonable time for their delivery in violation of a state law, in order that the purchaser may have time in which to pay the purchase price. In other words, a carrier of interstate commerce is equally subject to the warehouse and storage laws of a state as are the ordinary citizens of that state engaged in the storage and warehouse business, and the mere fact that the carrier may see proper to add to its ordinary duties of a common carrier, an additional contractual obligation not to deliver the goods within a reasonable time, will not exempt the carrier from the state laws governing the storage of goods, and the laws

thereof governing the collection of debts. And especially should this be, where the state law relates to the contractual delay duty of delivery of the carrier concerning intoxicating liquors, which all courts in Christendom hold is within itself a nuisance, and that the liquor business is also unlawful, except where authorized by statute. *State* v. *Distilling Co.*, 236 Mo. 219, 139 S. W. 453, where many of the cases, state and federal, are cited and considered, bearing upon that question.

These suggestions illustrate the principle of law I have in mind, namely, that the storage of goods after their delivery, or after the lapse of a reasonable time for their delivery, is a separate and independent matter from either state or interstate commerce, and is and must be governed by the storage laws of the state where they are located, and as a necessary sequence, the collection of the purchase price of the goods, at least, after the storage period has begun, is and must be governed by the laws of the state where they are located, and the collection is to be made.

While I believe that the Constitution of the United States is the greatest and wisest instrument ever written for the government of a great nation, and especially the commerce clause thereof, of which so much has been said and written, yet I do not believe that its wise and useful purpose was designed for, or should be used as a shield for, the protection of designing persons engaged in a business prohibited by the laws of any state, so long as those laws do not in any manner interfere with the transportation and delivery of articles shipped from one state to another, or from a foreign country. Of course, I am not considering the questions of taxation of articles of importation, etc., but am trying to confine my observations to the single question in hand.

But it has been suggested: Suppose liquors should be shipped today from Kansas City to Austin, Tex., C. O. D., and the contract should be silent as to the time of delivery, which would of course mean a reasonable time, and within that time the goods should be delivered and the purchase price paid to the carrier? In answer to that suggestion I would say that no such case is before the court; but by way of *obiter* I would say that in principle there would be no difference in the two cases, for the reason that the legal duty of the carrier to ship and deliver the goods, and the contract or agreement to collect the purchase price, etc., are not so interdependent as to prohibit the Legislature from segregating the former from the latter, and enacting laws in the nature of police regulations regarding the collections. And no fair minded disinterested man can read this record without reaching the conclusion that the C. O. D. contract mentioned in this case was resorted to in order to sell intoxicating liquors in the State of Texas in violation of the laws thereof, and in order to meet this evil the statute of 1907 was by the Legislature of that State enacted, and not for the purpose of interfering with state or interstate commerce.

It has been suggested that, if such a statute is upheld, then the Legislature of a state might, under the guise of regulating the storage of property and the collection of money, thereby interfere with and stifle interstate commerce. In answer to that suggestion, I simply refer the parties to the able, well-considered and patriotic opinions in the cases of *Express Co.* v. *Kentucky, supra, American Express Co.* v. *Iowa, supra; Heymann* v. *Southern Railway Co.*, 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178, 7 Ann. Cas. 1130, with the added observations that the Supreme Court of the

United States, in the future as in the past, will never lend countenance to any rule, statute, or judicial ruling of any state authorizing the erection of a wall of any kind against free intercourse and the transportation of persons and property from one state to another.

Believing as I do that said statute does not in any manner operate in restraint of interstate commerce, I am clearly of the opinion that the same is a valid enactment, as was held by the Texas Civil Court of Appeals in the case of *Craddock* v. *Wells-Fargo Express Co., supra.*

I am therefore of the opinion that when said statute went into effect, it was a valid police regulation, and a legal excuse for the defendant's refusal to deliver the liquors and collect the purchase price thereof.

II. Regarding the second reason assigned by defendant for a reversal of the judgment, namely, that if it is liable at all to the plaintiff, it is not for a conversion of the liquor shipped, but for damages for a breach of the C. O. D. contract, as before defined, for non-delivery of the liquors and not collecting the purchase price thereof, as therein provided. If we are correct in holding in paragraph I of this opinion that the C. O. D. contract mentioned was separate and independent of the defendant's duty as a common carrier to transport and deliver the packages within a reasonable time, then clearly, under the undisputed evidence that the defendant still has the packages and offers to return them to the plaintiff upon the payment of the express charges from Texas to Kansas City, there could be no conversion.

These facts do not constitute a conversion of the liquors but a breach of the C. O. D. contract, which took effect after the defendant's duty to the plaintiff as a common carrier had terminated.

> Entertaining these views, I am of the opinion that the judgment of the Circuit Court should be reversed, and it is so ordered. All concur, except Bond, J., and Faris, J., who dissent."

It therefore appears from the foregoing opinion rendered by the Supreme Court of the State of Missouri that the judgment of reversal rested upon a non-federal ground broad enough to sustain the judgment of reversal, to-wit: That, under the pleadings and evidence, there was no conversion, and that plaintiff in error in this court had brought the wrong action, if he had any; that he should have sued for damages for violation of the special agreement to collect the contract price, and not in conversion.

Wherefore, the defendant in error moves the court to dismiss this writ of error for want of jurisdiction, in that the judgment of the Supreme Court of the State of Missouri does not rest solely upon federal grounds, but that the judgment of the lower court was reversed on a non-federal ground; and there is no federal question decided by the Supreme Court of the State of Missouri, denying plaintiff in error of any right, title, privilege or immunity given by the Constitution or laws of the United States; and no right, title, privilege or immunity given plaintiff in error by the Constitution of the United States, or any law made in pursuance thereof, was denied him by the judgment of the Supreme Court of the State of Missouri.

I. N. WATSON,
Attorney for Defendant in Error.

J. L. MINNIS, *of Counsel.*
On Briefs.

No. [redacted] 248

IN THE

Supreme Court of the United States.

ABRAM ROSENBERGER, PLAINTIFF IN ERROR,

VS.

PACIFIC EXPRESS COMPANY, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR IN SUPPORT OF MOTION TO DISMISS WRIT OF ERROR.

J. L. MINNIS,
I. N. WATSON,
Counsel for Defendant in Error.

No. .....

IN THE

Supreme Court of the United States.

ABRAM ROSENBERGER, PLAINTIFF IN ERROR.

VS.

PACIFIC EXPRESS COMPANY, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR IN SUPPORT OF MOTION TO DISMISS WRIT OF ERROR.

Defendant in error asks that the writ of error in this case be dismissed, for the reason that it appears from the opinion rendered by the Supreme Court of the State of Missouri that the judgment was not based upon a Federal ground alone, but that the judgment rested on a non-federal ground, to-wit: That the plaintiff in the trial court had brought the wrong kind of an action; that the facts did not warrant an action for conversion, but at best they afforded an action for damages for violation of a special agreement to collect the C. O. D. charges.

Defendant in error asked for the reversal of the judgment of the trial court for two reasons; First, Because the trial court held that the statutes of Texas mentioned, were no excuse or justification for defendant's refusal to deliver the packages mentioned; Second, Because the undisputed evidence shows that, if the defendant is liable to the plaintiff in any manner, it is for breach of contract and not for a conversion of these goods.

The Supreme Court of Missouri took up each of these points and disposed of them against the contentions of the plaintiff in error in this court. Under the first point, the Supreme Court of the State of Missouri held that the questions raised in the record in this case in the trial court did not involve a question of interstate commerce. The contract of shipment required at the time of delivery that defendant in error collect the C. O. D. charges, and the contract provided for the company holding the goods for thirty days. It did not provide for a delivery within a reasonable time, which is required by law. The law imposed a duty to carry and deliver within a reasonable time, but the duty to collect the C. O. D. charges was imposed by contract.

Hutchinson on Carriers, 3d Ed. Secs. 726-728-729.

U. S. Express Co. v. *Keifer*, 59 Ind. 263.

Elliott on Railroads, Vol. 4, Sec. 1530.

Amr. & Eng. Ency. of Law, 2 Ed. Vol. 12, p. 533.

Cox et al. v. *Rd. Co.*, 91 Ala. 392 (8 So. R. 824.)

Express Co. v. *Commonwealth*, 29 Ky. Law, 529.
Moore on Carriers, Sec. 31.
Hale on Bailments and Carriers, p. 451.
McNichols v. *Express Co.*, 12 Mo. App. 401.
Fowler Com. Co. v. *Rd. Co.*, 98 Mo. App. App. 210.
Danciger v. *Pac. Exp. Co.*, 154 Fed. 379.

II.

The Supreme Court of the State of Missouri rested its decision on the first point partly upon the ground that the scheme devised by the plaintiff in error in this case was a fraud, or a mere subterfuge to avoid the laws of the State of Texas. The Supreme Court of Missouri, in its opinion, says:

> "And no fair-minded disinterested man could read this record without reaching the conclusion that the C. O. D. contract mentioned in this case was resorted to in order to sell intoxicating liquors in the State of Texas in violation of the laws thereof, and, in order to meet this evil, the statute of 1907 was by the legislature of that state enacted, and not for the purpose of interfering with state or interstate commerce."

It will thus be seen that the Supreme Court of the State of Missouri held that, under the facts in this case, the plaintiff in error was guilty of a fraud practiced upon the State of Texas under the disguise of this C. O. D. contract, and that its decision was not based upon a federal ground, but upon a non-federal ground, to-wit: Fraudulent acts of the plaintiff in error.

III.

But the second point upon which the decision rests is unquestionably a non-federal ground, and affords no right to a writ of error from this court. The second point made by the defendant in error in the Supreme Court of Missouri was that, under the undisputed evidence, if the defendant was liable at all, it was for a breach of contract, and not for a conversion of the goods. The Supreme Court of Missouri sustained this point, which would support the judgment of reversal without regard to the first point made by the defendant in error. The opinion upon this second point is as follows:

> "II. Regarding the second reason assigned by defendant for a reversal of the judgment, namely, that if it is liable at all to the plaintiff, it is not for a conversion of the liquor shipped, but for damages for a breach of the C. O. D. contract as before defined, for nondelivery of the liquors and not collecting the purchase price thereof, as therein provided. If we are correct in holding in paragraph 1 of this opinion that the C. O. D. contract mentioned was separate and independent of the defendant's duty as a common carrier to transport and deliver the packages within a reasonable time, then clearly, under the undisputed evidence that the defendant still has the packages and offers to return them to the plaintiff upon the payment of the express charges from Texas to Kansas City, there could be no conversion.
>
> These facts do not constitute a conversion of the liquors, but a breach of the C. O. D. contract, which took effect after the defendant's duty to the plaintiff as a common carrier had terminated."

It will thus be seen that it is clear from the foregoing opinion that the judgment of reversal of the Supreme Court of the State of Missouri rested upon one ground which was a non-federal ground, and was broad enough to sustain the judgment. If the plaintiff brought the wrong kind of an action, which the Supreme Court of Missouri held he had, this did not raise any federal question whatever. The decisions of this court are clear that, if the judgment rested on a non-federal ground broad enough to sustain it, this court has no jurisdiction to issue a writ of error to review such judgment.

Kansas City Star Co. v. *Henry S. Julian*, 215 U. S. 589, 30 Sup. Ct. Rep. 406.
Cincinnati Street Ry. Co. v. *Snell*, 193 U. S. 30, 24 Sup. Ct. Rep. 319.
Hammond Packing Co. v. *Arkansas*, 212 U. S. 322, 29 Sup. Ct. Rep. 370.
Powell v. *Supervisors of Brunswick County*, 150 U. S. 433, 14 Sup. Ct. Rep. 168.
Sayward v. *Denny*, 158 U. S. 180, 15 Sup. Ct. Rep. 777.
Axley Stave Co. v. *Butler County*, 17 Sup. Ct. Rep. 709.

We therefore submit that the writ of error should be dismissed for want of jurisdiction in this court to issue the same.

Respectfully submitted,

J. L. MINNIS,
I. N. WATSON,
Counsel for Defendant in Error.

No. 249

In the

Supreme Court of the United States

ABRAM ROSENBERGER, *Plaintiff in Error,*

vs.

PACIFIC EXPRESS COMPANY, *Defendant in Error.*

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR IN OPPOSITION TO THE MOTION OF DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR.

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In the

Supreme Court of the United States

ABRAM ROSENBERGER, *Plaintiff in Error,*

vs.

PACIFIC EXPRESS COMPANY, *Defendant in Error.*

No. 626.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR IN OPPOSITION TO THE MOTION OF DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR.

The Supreme Court of Missouri stated the facts in this case as follows:

> "This is a suit in conversion.
>
> "The facts of this case are undisputed and are briefly as follows:
>
> "The plaintiff, at all the times hereinafter mentioned, was a wholesale liquor dealer in Kansas City, Missouri, transacting business in the ordinary manner throughout the United

States; and the defendant, the Pacific Express Company, a common carrier, was during said times engaged in carrying express matters throughout the United States, and especially from the state of Missouri to the state of Texas. That shortly prior to February 12, 1907, the plaintiff delivered to the defendant, express prepaid, certain packages of liquor to be transported by it to the former's customers in the state of Texas; the delivery thereof to be made on the payment of the price thereof, as will be presently stated.

"On said February 12, 1907, the state of Texas duly enacted a statute imposing an occupation tax on all persons and corporations 'handling liquors C. O. D.' The license or tax imposed by the statute was $5,000 a year at each place maintained for that purpose.

"That after the acceptance of said liquors by the defendant and prior to their delivery, said statute went into effect, and the defendant refused to deliver the packages or to collect the price thereof, and after due notice returned the same to the plaintiff at Kansas City, where they offered to deliver them to the plaintiff, upon condition that he pay the return express charges thereon. The plaintiff refused to pay said charges, and to accept said goods, and the defendant now holds the same, as it claims, for the use of the plaintiff.

"The plaintiff instituted this suit in the Circuit Court of Jackson County against the defendant for converting said goods to its own use.

"The terms and conditions of the contract of carriage and delivery to be subsequently mentioned, made and entered into by and between the plaintiff and defendant, were in writing, and expressed in a receipt given to the former

by the latter upon the receipt of the goods for shipment.

"This receipt is the ordinary one given by express companies to the consignor of goods; and paragraph 6 thereof, the one relating to the C. O. D. question involved in this case, reads as follows:

" 'If any sum of money besides the charges for transportation is to be collected from the consignee on delivery of the above described property and the same is not paid for or if in any case the consignee cannot be found, or for any other reason it cannot be delivered, the shipper agrees that this company may return said property to him subject to the conditions of this receipt, and that he will pay all charges for transportation,' etc.

"By paragraph 3 of the same contract it is also provided that:

" 'Defendant shall not be liable for any loss or damages by act of God, or of the enemies of government, or by the restraint of government,' etc.

"That after the taking effect of the Texas statute the defendant notified the plaintiff that if he would release the C. O. D. contract it would deliver the goods to the consignee; this the plaintiff refused to do, but insisted on the defendant carrying out its contract of shipment and delivery, and that it deliver the packages to the consignee and collect the C. O. D. charges which it refused to do; but upon the contrary ordered its agent to return the liquor to Kansas City, and charged the return express charges to the plaintiff, as previously stated."

The Missouri Supreme Court held (Judges Bond and Faris dissenting) that when the defendant under-

took to carry each of the shipments in question it assumed two separate obligations, the common law obligation to carry the goods in question, and the contractual obligation to collect the charges on the same; that the transportation part of the transaction was protected by the commerce clause of the Federal Constitution; that the collecting part was not so protected; and therefore the Texas statute did not violate the interstate commerce provisions of the Federal Constitution (Sec. 8, Art. 1).

The language of Judge Woodson is as follows:

> "Believing as I do that said statute does not in any manner operate in restraint of interstate commerce, I am clearly of the opinion that the same is a valid enactment, as was held by the Texas Civil Court of Appeals in the case of *Craddock* v. *Wells Fargo Express Co., supra.*"

In reaching its conclusion the Supreme Court of Missouri adopted the line of reasoning which was followed by the state courts in *Iowa* v. *American Express Co.*, 118 Iowa 447 (overruled in *American Express Co.* v. *Iowa*, 196 U. S. 133), and in *Kentucky* v. *Adams Express Co.*, 124 Ky. 182 (overruled in *Adams Express Co.* v. *Kentucky*, 206 U. S. 129). This Court has uniformly held that a C. O. D. interstate shipment was an integral transaction and protected in all its parts by the commerce clause of the Constitution.

The point is well illustrated in *American Express Co.* v. *Iowa*, 196 U. S. 133 (*supra*). In its opinion in that case the Supreme Court of Iowa had said:

> "In accepting the goods and attempting to collect the purchase price, the company was not

acting as a carrier, simply, but was undertaking the performance of an act prohibited by our law. If the act of the carrier in assuming to collect the purchase price be considered as a sale of the goods, or if it be found that such transaction on its part is not freed from the operation of our laws, by reason of being but a lawful step incident to interstate commerce, then the liquors should have been condemned. * * * In assuming to collect the purchase price and to hold possession until the price was paid, it (the express company) was in no proper sense engaged in interstate commerce."

But Chief Justice White, then Mr. Justice White, delivering the opinion of this Court, said, in part:

"And, as, in order to decide the contention that the judgment below rests upon an adequate non-Federal ground, we must necessarily consider how far the C. O. D. shipment was protected by the commerce clause of the Constitution, which is the question on the merits, we pass from the motion to dismiss to the consideration of the rights asserted under the commerce clause of the Constitution."

Similar holdings were made in cases involving C. O. D. shipments, in *Adams Express Co.* v. *Kentucky*, 206 U. S. 129 (*supra*), and in *Norfolk, etc., Rld. Co.* v. *Sims*, 191 U. S. 441 (48 L. Ed. 258):

Having reached the conclusion that the Texas statute was valid, and therefore constituted a legal excuse for failing to deliver the goods in question, the court then said, in paragraph II of its opinion:

"If we are correct in holding in paragraph I of this opinion that the C. O. D. contract men-

> tioned was separate and independent of the defendant's duty as a common carrier to transport and deliver the packages within a reasonable time, then clearly, under the undisputed evidence that the defendant still has the packages and offers to return them to the plaintiff upon the payment of the express charges from Texas to Kansas City, there could be no conversion."

The Missouri Supreme Court did not hold that even if the Texas state statute was invalid the defendant was not guilty of conversion. The language of the opinion refutes any such contention, and there is no room for assuming that the court would have made such a ruling in the face of rules of law recognized as elementary by text-writers and the Missouri courts. Under the principle illustrated in *Bowman* v. *Chicago, etc., Ry. Co.*, 125 U. S. 507 (31 L. Ed. 715), and *Louisville, etc., Co.* v. *Cook, etc., Co.*, 223 U. S. 70 (56 L. Ed. 355), the Texas statute, if invalid, constituted no excuse for the failure to deliver the goods in controversy. Therefore the refusal of the defendant to deliver them, and its return of them to Kansas City, over plaintiff's objection, and its refusal to deliver them to plaintiff at Kansas City except on condition that plaintiff pay the return charges, constituted a conversion of said goods by defendant. (2 Hutchinson on Carriers, 3d Ed., Sec. 727; 2 Cooley on Torts, 3d Ed. 868-869; 6 Cyc. 474; *Marshall, etc., Co.* v. *Kansas City, etc., Ry. Co.*, 176 Mo. 480, 491; *Danciger Bros.* v. *American Express Co.*, 172 Mo. App. 391.)

It is clear, therefore, that the decision of the Missouri Supreme Court was based entirely on its

conclusion that the Texas statute did not violate the commerce provision of the Federal Constitution.

Having found that there was no conversion, for the reason that the Texas statute was valid, the judgment of the trial court was reversed outright, without a remanding of the cause. Under the Missouri practice this was a final decision of the case against the plaintiff and deprived the plaintiff of any opportunity to further prosecute said action. (*Strottman* v. *St. Louis, etc., Co.*, 228 Mo. 154.)

The decision of the Supreme Court of Missouri having been based on its holding that the Texas statute did not invade rights conferred upon the plaintiff by the Federal Constitution, a Federal question which is paramount and controlling is directly involved in this case, and the motion to dismiss the writ of error is not well taken.

Respectfully submitted,

Frank A. Boys

Of Counsel on Brief.

Dec. 7th, 1914.

No. 249.

In the

Supreme Court of the United States

October Term, 1915.

ABRAM ROSENBERGER, *Plaintiff in Error,*

vs.

PACIFIC EXPRESS COMPANY, *Defendant in Error.*

In Error to the Supreme Court of the State of Missouri.

STATEMENT, ASSIGNMENTS OF ERROR, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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In the

Supreme Court of the United States

October Term, 1915.

ABRAM ROSENBERGER, *Plaintiff in Error,*

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PACIFIC EXPRESS COMPANY, *Defendant in Error.*

In Error to the Supreme Court of the State of Missouri.

STATEMENT, ASSIGNMENTS OF ERROR, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

No. 249.

STATEMENT.

Prior to February 12, 1907, plaintiff in error, hereinafter called the plaintiff, received in Kansas City, Missouri, *bona fide* orders from purchasers

in Texas for liquor to be sent to Texas C. O. D. in original packages. (Transcript of Record, p. 15.)

These orders were accepted by plaintiff in Kansas City, and plaintiff, pursuant thereto and prior to February 12, 1907, delivered the packages of liquor in controversy to the defendant in error, hereinafter called the defendant, to be transported to customers in Texas, the delivery of each package to be made on payment by the customer of the price thereof, and the defendant accepted these packages and undertook the performance of their shipment and delivery, and the collection of the price therefor. (Transcript of Record, pp. 14, 15.)

On February 12, 1907 (Transcript of Record, pp. 23, 24), the state of Texas enacted a statute imposing or attempting to impose an occupation tax on persons, firms or corporations handling liquors C. O. D., the tax being $5,000 a year on each office maintained, said statute being as follows:

> "TAXES—IMPOSING OCCUPATION TAX ON PERSONS, FIRMS OR CORPORATIONS HANDLING LIQUORS C. O. D.
>
> H. B. No. 53. Chapter IV.
>
> An Act imposing an annual occupation tax upon each office or place kept and maintained by any person, firm or corporation in this state at which intoxicating liquors legally deliverable are delivered upon payment of purchase money therefor, providing a penalty for failure to pay such tax, and declaring an emergency.
>
> SECTION 1. Be it enacted by the Legislature of the State of Texas: Any person, firm or corporation doing business in this state

shall, at each office or place kept, operated or maintained by such person, firm or corporation at which intoxicating liquors legally deliverable are delivered upon payment of purchase money therefor commonly designated as shipments C. O. D., pay annually for each office or place so kept an annual occupation tax to the state of Texas of five thousand dollars, and any county or any incorporated city or town wherein such office or place is located, may levy an annual occupation tax upon such person, firm or corporation herein referred to for each of said offices not to exceed one-half of the amount hereby levied by the state, such tax to be due and payable annually.

SEC. 2. The maintaining or operating such office or offices, place or places by any person, firm or corporation in this state without paying the occupation tax required in section one of this Act shall subject such person, firm or corporation so operating and maintaining such office or offices, place or places, to pay to the state of Texas the sum of fifty dollars, and to the county and any incorporated city or town in which said offices or places are located, each the sum of fifty dollars for each day such office or offices, place or places may be maintained or operated for each office or place so operated; and the state or county or any incorporated city or town may sue for and recover either jointly or severally, each the said sum, for each day that each of said offices or places may be maintained and operated without prepayment of the aforesaid occupation tax.

SEC. 3. The fact that persons, firms and corporations are doing an extensive business in shipping and delivering intoxicating liquors in this state at their various offices or places

on the payment of the purchase money therefor and are paying no occupation tax for such privilege, creates an emergency and an imperative public necessity for the suspension of the constitutional rule requiring bills to be read on three several days in each house, and that this Act take effect from and after its passage, and it is so enacted.

(Note—The enrolled bill shows that the foregoing Act passed the House of Representatives by the following vote, yeas 104, nays 3; was referred to the Senate, amended and passed by the following vote, yeas 29, nays 0; the House concurred in Senate amendments by the following vote, yeas 94, nays 4.)

Approved February 12, 1907.

Became a law February 12, 1907."

On the passage of this Act the defendant refused to make deliveries of the goods theretofore received by it (Transcript of Record, p. 15), or to make any collections on account thereof, and returned the goods to Kansas City, where it offered to deliver them to the plaintiff only on condition that plaintiff pay the full return charges thereon. The plaintiff refused to accede to this demand, the defendant retained the goods (Transcript of Record, pp. 20, 21), and plaintiff sued the defendant for conversion, in this action, in the Circuit Court of Jackson County, Missouri, where the plaintiff recovered judgment against the defendant. The defendant appealed to the Supreme Court of Missouri, where the judgment of the Circuit Court was reversed, without remanding, said Supreme Court of Missouri hold-

ing that the Texas statute above referred to was valid, and justified defendant in refusing to deliver the goods in controversy, and therefore the plaintiff was not entitled to recover. Under the Missouri practice this was a final decision of the case and deprived the plaintiff of any opportunity to further prosecute this action. (*Strottman v. St. Louis, etc., Co.*, 228 Mo. 154.) Plaintiff in error, in the trial court and in the Supreme Court of Missouri, attacked the validity of the Texas statute as being in contravention of Sections 8 and 10 of Article 1 of the Constitution of the United States (Transcript of Record, pp. 24, 30, 34), and contended that it was therefore no excuse for the refusal of defendant to deliver said goods. Plaintiff's contention being denied by the Supreme Court of Missouri, a writ of error was sued out in this Court, and in due time the record was filed in this Court.

ASSIGNMENTS OF ERROR.

Plaintiff in error makes the following assignments of error in this Court, and because of such errors prays for a reversal of the judgment of the Supreme Court of the State of Missouri (Transcript of Record, pp. 2, 3):

The Supreme Court of Missouri erred in holding and deciding:

1. That said statute of Texas of February 12, 1907, was a valid enactment of the Legislature of said state, insofar as it affected, applied to or controlled interstate C. O. D. shipments of original packages of liquor shipped from the state of Missouri to the state of Texas, and was not repugnant to or in contravention of either Section 8 or Section 10 of Article I of the Constitution of the United States.

2. That said Act of the state of Texas of February 12, 1907, was a valid police regulation of the state of Texas and was not repugnant to or in contravention of either Section 8 or Section 10 of Article I of the Constitution of the United States and was, therefore, a legal excuse for the refusal of respondent Pacific Express Company to comply with its obligations and undertakings to and with respondent Abram Rosenberger to carry from Missouri and deliver in Texas original packages of liquor and collect the cost price thereof on delivery, the said appellant Pacific Express Company having received such packages from respondent Abram Rosenberger in Missouri

and having agreed in Missouri to carry them from the state of Missouri to the state of Texas and to deliver the same, in Texas, to the consignees thereof (who had purchased the same in Missouri) on the payment of the purchase price thereof by such consignees; such obligations and undertakings having been assumed by appellant Pacific Express Company prior to the passage of such Texas statute.

3. That the trial court properly admitted in evidence the said statute of the state of Texas of February 12, 1907, and did not err in overruling the objection of respondent that said statute was in contravention of Section 8 of Article I of the Constitution of the United States.

4. In not holding that said statute of Texas of February 12, 1907, is an unwarranted attempt to regulate interstate commerce and is violative of Section 8 of Article I of the Constitution of the United States.

5. In reversing the judgment in favor of respondent, whereby the erroneous rulings aforesaid were made.

BRIEF AND ARGUMENT.

I.

Liquor is an article of commerce and is entitled to the same protection under the commerce clause of the Federal Constitution as any other commodity in the absence of an Act of Congress to the contrary. The Wilson Act of August, 1890, which was the only Federal law at the time the cause of action in question arose tending to regulate interstate commerce in liquor, goes no farther than to subject an interstate shipment of liquor to state regulation after it has been delivered to the consignee and while still in the original package. The effect of this Act was merely to do away with the original package doctrine and the rights incident thereto.

(a) Liquor is an article of commerce.

In *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. Ed. 128 (decided April 28, 1890), the court said:

> "Ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic like any other commodity in which the right of traffic exists and are so recognized by the usages of the commercial world."

In Re Rahrer, 140 U. S. 545, 35 L. Ed. 572 (decided May 25, 1891), the court said:

> "Unquestionably fermented, distilled or other intoxicating liquors or liquids are subjects of commercial intercourse, exchange, barter and traffic between nation and nation and between state and state, like any other

commodity in which the right of traffic exists and recognized as such by the usages of the commercial world, the laws of Congress and the decisions of courts."

In *Louisville & N. R. Co. v. Cook Brewing Co.*, 223 U. S. 70, 56 L. Ed. 355 (decided January 22, 1912), Mr. Justice Lurton, delivering the opinion of the court, said:

"By a long line of decisions, beginning even prior to *Leisy v. Hardin*, 135 U. S. 100, 34 L. Ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, it has been indisputably determined:

(a) That beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce;

(b) That it is not competent for any state to forbid any common carrier to transport such articles from a consignor in one state to a consignee in another;

(c) That until such transportation is concluded by delivery to the consignee, such commodities do not become subject to state regulation, restraining their sale or disposition."

(b) The Wilson Act.

In *Rhodes v. State of Iowa*, 170 U. S. 412, 42 L. Ed. 1088, 1096 (decided May 9, 1898), in construing the Wilson Act, Mr. Justice White, delivering the opinion of the majority of the court, said:

"We think that, interpreting the statute by the light of all its provisions, it was not intended to and did not cause the power of

> the state to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee."

This case, though decided by a divided court, has been followed by every subsequent case involving the same point and has not been limited or criticised.

In *Louisville & N. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70, 56 L. Ed. 355 (decided January 22, 1912), Mr. Justice Lurton, delivering the opinion of the court, said:

> "The Wilson Act (26 Stat. at L. 313, Chap. 728, U. S. Comp. Stat. 1901, p. 3177), which subjects such liquors to state regulation, although still in the original packages, does not apply before actual delivery to such consignee, where the shipment is interstate. Some of the many later cases in which these matters have been so determined and the Wilson Act construed are: *Rhodes* v. *Iowa*, 170 U. S. 412, 42 L. Ed. 1088, 18 Sup. Ct. Rep. 664; *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438, 42 L. Ed. 1100, 18 Sup. Ct. Rep. 674; *Heymann* v. *Southern R. Co.*, 203 U. S. 270, 51 L. Ed. 178, 27 Sup. Ct. Rep. 104, 7 A. & E. Ann. Cas. 1130; *Adams Exp. Co.* v. *Kentucky*, 214 U. S. 218, 53 L. Ed. 972, 29 Sup. Ct. Rep. 633."

II.

The Texas occupation tax statute of February 12, 1907, was no defense for defendant's failure to perform its contracts of shipment and collection because, if applicable to the shipments in controversy, the Act was an attempted state regulation of interstate commerce and therefore unconstitutional.

(a) The contracts whereby the defendant undertook to carry the liquor in question from Kansas City, Missouri, to various points in the state of Texas and to collect the purchase price thereof from the consignees were in reference to and formed an integral part of interstate commerce transactions, and the state of Texas was without legal power to impose burdens on or to prevent the performance of such contracts.

The commerce clause of the Federal Constitution vests in Congress the exclusive right to regulate interstate commerce and the failure of Congress to enact a law on the subject of C. O. D. liquor shipments did not give Texas authority to enact such a law involving interstate commerce.

Judge Taney, in *Peirce* v. *New Hampshire*, 5 How. 506, first held that the state in the absence of congressional enactment had the authority to enact laws involving interstate commerce, but this doctrine was changed by *Bowman* v. *C. & N. W. Ry.*, 125 U. S. 507 (31 L. Ed. 715), which is quoted in *Leisy* v. *Hardin*, 135 U. S. 100 (34 L. Ed. 128), which states, on page 136 of the last cited edition, the following:

> "But, where the subject is national in its character, and admits and requires uniform-

ity of regulation, affecting alike all of the states, such as transportation between the states, including the importation of goods from one state into another, Congress alone can act upon it and provide the needed regulations. *The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free.* Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the states shall be unrestricted."

In Re Rahrer, 140 U. S. 545 (decided May 25, 1891), Chief Justice Fuller said:

"The power of Congress to regulate commerce among the several states, when the subjects of that power are national in their nature, is also exclusive. The Constitution does not provide that interstate commerce shall be free, but by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraint. Therefore, it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states."

In *Welton* v. *Missouri*, 91 U. S. 275 (23 L. Ed. 347, 350), Justice Field said:

"The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question.

> Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammeled."

The principle of constitutional law expounded in the foregoing cases has been so held by this Court to prevent the several states from prohibiting or imposing burdens on the performance of interstate C. O. D. contracts.

In *Adams Express Co.* v. *Kentucky*, 206 U. S. 129, 51 L. Ed. 987 (decided May 13, 1907), the express company having transported a gallon of whisky from Ohio into Kentucky under a C. O. D. contract and having collected the purchase price thereof from the consignee, was indicted and convicted for selling whisky in violation of the following Kentucky statute:

> "All the shipments of spirituous, vinous, or malt liquors, to be paid for on delivery, commonly called 'C. O. D. shipments,' into any county, city, town, district, or precinct where said Act is in force, shall be unlawful and shall be deemed sales of such liquors at the place where the money is paid or the goods delivered; the carrier and his agents selling or delivering such goods shall be liable jointly with the vendor thereof."

The case was ultimately appealed to this Court on the ground that the statute under which defendant was convicted was in conflict with the commerce clause of the Federal Constitution. Mr.

Justice Brewer, delivering the opinion of the Court, said:

> "The testimony showed that the package, containing a gallon of whisky, was shipped from Cincinnati, Ohio, to George Meece, at East Bernstadt, Kentucky. The transaction was therefore one of interstate commerce, and within the exclusive jurisdiction of Congress. The Kentucky statute is obviously an attempt to regulate such interstate commerce. This is hardly questioned by the court of appeals, and is beyond dispute under the decisions of this court.
>
> In *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438, 444, 42 L. Ed. 1100, 1103, 18 Sup. Ct. Rep. 674, 676, Mr. Justice White, delivering the opinion of the court, said:
>
> 'Equally well established is the proposition that the right to send liquors from one state into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and, hence, that a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States.'
>
> In *Rhodes* v. *Iowa*, 170 U. S. 412, 426, 42 L. Ed. 1088, 18 Sup. Ct. Rep. 664, 669, it was held that the Wilson Act (26 Stat. at L. 313, Chap. 728, U. S. Comp. Stat. 1901, p. 3177), 'was not intended to and did not cause the power of the state to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of

destination and delivery there to the consignee.'"

* * * * *

In its opinion the Court of Appeals, in 124 Ky. 182, had said:

"Express companies do not more surely deliver goods entrusted to them than do ordinary freight trains, but they undertake a quicker delivery, and by reason of such undertaking, are permitted to charge and are paid more than are railroad companies. A failure, therefore, upon their part to immediately—that is, in a reasonable and customary time—deliver goods shipped in their charge, or their holding of such goods an unreasonable or unusual time, changes their relations at once from a common carrier to that of an ordinary warehouseman. In view of this rule, and under the facts of the case at bar, we must conclude that at the time of delivering to Meece the whisky in question, and in receiving the price paid by the latter therefor appellant did not sustain to that article of merchandise, or to the consignor or consignee, the relation of common carrier, but merely that of a bailee or warehouseman, for which reason we are unable to see how it was or could have been protected in the transaction by the law of interstate commerce."

In repudiating this theory Mr. Justice Brewer said:

"The (Kentucky) court held that, by reason of the retention of the package by the agent, the company ceased to hold it as carrier, and had become a mere bailee or

warehouseman; that, therefore, the statute, as applied to the transaction, was not a regulation of commerce. * * * That the agent consented to hold the whisky until Saturday did not destroy the character of the transaction as one of interstate commerce is settled by the recent case of *Heymann* v. *Southern Railway Company*, 203 U. S. 270."

* * * * *

"Much as we may sympathize with the efforts to put a stop to the sales of intoxicating liquors in defiance of the policy of a state, we are not at liberty to recognize any rule which will nullify or tend to weaken the power vested by the Constitution in Congress over interstate commerce.

The judgment of the Court of Appeals of Kentucky is reversed and the case remanded for further proceedings not inconsistent with this opinion."

This case has not been limited, criticised or overruled.

In *American Express Co.* v. *Iowa*, 196 U. S. 133, 49 L. Ed. 417 (decided January 3, 1905), Mr. Justice White tersely stated the facts as follows:

"The American Express Company received at Rock Island, Illinois, on or about March 29, 1900, four boxes of merchandise to be carried to Tama, Iowa, to be there delivered to four different persons, one of the packages being consigned to each. The shipment was C. O. D., $3 to be collected on each package, exclusive of 35 cents for carriage of each. On March 31st the merchandise reached Tama, and on that day was seized

in the hands of the express agent. This was based on an information before a justice of the peace, charging that the packages contained intoxicating liquor held by the express company for sale. The express company and its agent answered, setting up the receipt of the packages in Illinois, not for sale in Iowa, but for carriage and delivery to the consignees. An agreed statement of facts was stipulated admitting the receipt, the carriage, and the holding of the packages as above stated. The seizure was sustained. Appeal was taken to a District Court. The express company and its agent amended their answer, specially setting up the commerce clause of the Constitution of the United States. There was judgment in favor of the express company, and the state of Iowa appealed to the Supreme Court and obtained a reversal. 118 Iowa 447, 92 N. W. 66. This writ of error was prosecuted."

The Supreme Court of Iowa had stated its position in the following language:

"In accepting the goods and attempting to collect the purchase price, the company was not acting as a carrier, simply, but was undertaking the performance of an act prohibited by our law. If the act of the carrier in assuming to collect the purchase price be considered as a sale of the goods, or if it be found that such transaction on its part is not freed from the operation of our laws, by reason of being but a lawful step incident to interstate commerce, then the liquors should have been condemned. * * * In assuming to collect the purchase price and to hold possession until the price was paid, it (the

express company) was in no proper sense engaged in interstate commerce."

But Mr. Justice White, delivering the opinion of the court, said:

"And, as, in order to decide the contention that the judgment below rests upon an adequate non-Federal ground, we must necessarily consider how far the C. O. D. shipment was protected by the commerce clause of the Constitution, which is the question on the merits, we pass from the motion to dismiss to the consideration of the rights asserted under the commerce clause of the Constitution."

After reviewing *Bowman* v. *Chicago & N. W. R. Co.*, 125 U. S. 465, 31 L. Ed. 70; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. Ed. 128; *Rhodes* v. *Iowa*, 170 U. S. 412, 42 L. Ed. 1088, and *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438, 442, 42 L. Ed. 1100, 1102, the court continued:

"Coming to test the ruling of the court below by the settled construction of the commerce clause of the Constitution, expounded in the cases just reviewed, the error of its conclusion is manifest. Those cases rested upon the broad principle of the freedom of commerce between the states, and of the right of a citizen of one state to freely contract to receive merchandise from another state, and of the equal right of the citizen of a state to contract to send merchandise into other states. *They rested also upon the obvious want of power of one state to destroy*

contracts concerning interstate commerce, valid in the states where made."

* * * * * *

"Beyond possible question, the contract to sell and ship was completed in Illinois. The right of the parties to make a contract in Illinois for the sale and purchase of merchandise, and, in doing so, to fix by agreement the time when and condition on which the completed title should pass, is beyond question. The shipment from the state of Illinois into the state of Iowa of the merchandise constituted interstate commerce. To sustain, therefore, the ruling of the court below would require us to decide that the law of Iowa operated in another state so as to invalidate a lawful contract as to interstate commerce made in such other state."

* * * * * *

"When it is considered that the necessary result of the ruling below was to hold that, wherever merchandise shipped from one state to another state is not completely delivered to the buyer at the point of shipment so as to be at his risk from that moment, the movement of such merchandise is not interstate commerce, it becomes apparent that the principle, if sustained, would operate materially to cripple, if not destroy, that freedom of commerce between the states which it was the great purpose of the Constitution to promote. *If upheld, the doctrine would deprive a citizen of one state of his right to order merchandise from another state at the risk of the seller as to delivery. It would prevent the citizen of one state from shipping into another unless he assumed the risk; it would subject contracts made by common carriers, and valid by the laws of the state where made, to the laws of another state; and it would remove*

> *from the protection of the interstate commerce clause all goods on consignment upon any condition as to delivery, express or implied.* Besides, it would also render the commerce clause of the Constitution inoperative as to all that vast body of transactions by which the products of the country move in the channels of interstate commerce by means of bills of lading to the shipper's order, with drafts for the purchase price attached, and many other transactions essential to the freedom of commerce, by which the complete title to merchandise is postponed to the delivery thereof.
>
> But the general considerations need not be further adverted to in view of prior decisions of this court relating to the identical question here presented."

The court then cited and quoted from *Caldwell* v. *North Carolina*, 187 U. S. 622, 47 L. Ed. 336, and *Norfolk & W. R. Co.* v. *Sims*, 191 U. S. 441, 48 L. Ed. 254, recognized them to control the question under consideration and reversed the judgment of the Supreme Court of Iowa because it did not apply the commerce clause of the Federal Constitution to protect C. O. D. shipments.

In *Norfolk & W. R. Co.* v. *Sims*, 191 U. S. 441, 48 L. Ed. 254 (decided December 7, 1903), a resident of North Carolina mailed an order to Sears, Roebuck & Company at Chicago for a sewing machine which was accepted and the machine was shipped C. O. D. The consignee paid the amount of the purchase price, but before the machine was delivered by the carrier

it was levied upon by the sheriff on the ground that Sears, Roebuck & Company owed the state of North Carolina a license fee of $350 under the following statute:

> "Every manufacturer of sewing machines, and every person or persons or corporation engaged in the business of selling the same in this state, shall, before selling or offering for sale any such machine, pay to the state treasurer a tax of $350 and obtain a license, which shall operate for one year from the date of the issue."

The Supreme Court of North Carolina held that this statute did not conflict with the commerce clause of the Federal Constitution and the case was before this Court on writ of error.

Speaking of the C. O. D. shipment the Supreme Court of North Carolina had said (*Sims* v. *R. R.*, 130 N. C., l. c. 557):

> "Thus the title could not pass till such payment was made to the common carrier, acting as the agent of the shipper. This was an executory contract in Illinois, but there was no sale till the payment was made and thus the sale was executed in North Carolina and the shippers are liable to the above tax. * * *
>
> The well-known case of *O'Neal* v. *Vermont*, 144 U. S. 324, is decisive of that point. There, in the shipment of liquor from New York into Vermont C. O. D., it was held that the completed executory contract was in New York, but the completed sale was in Vermont, as here."

Mr. Justice Brown, in delivering the opinion of this Court, said:

> "Indeed, the cases upon this subject are almost too numerous for citation, and the one under consideration is clearly controlled by them. The sewing machine was made and sold in another state, shipped to North Carolina in its original package for delivery to the consignee upon payment of its price. It had never become commingled with the general mass of property within the state. While technically the title of the machine may not have passed until the price was paid, the sale was actually made in Chicago, *and the fact that the price was to be collected in North Carolina is too slender a thread upon which to hang an exception of the transaction from a rule which would otherwise declare the tax to be an interference with interstate commerce.*
>
> The judgment of the Supreme Court of North Carolina is therefore reversed and the case remanded to that court for further proceedings not inconsistent with this opinion."

(Note: In *O'Neal* v. *Vermont*, this Court held a Federal question was not properly raised and *did not* pass upon the question as to the place of sale. The Vermont court had already decided that question.)

In *Caldwell* v. *North Carolina*, 187 U. S. 622, 47 L. Ed. 336 (decided January 12, 1903), the defendant was tried for violating the following ordinance of Greensboro, North Carolina:

> "That every person engaged in the business of selling or delivering picture frames, pictures, photographs, or likenesses of the

> human face, in the city of Greensboro, whether an order for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business for which a license has already been paid to the city, shall pay a license tax of $10 for each year.
>
> Any person engaging in said business without having paid the license tax required herein shall be fined $20 and each and every sale or delivery shall constitute a separate and distinct offense."

The defendant was the agent of a non-resident picture company and had delivered pictures and frames to persons who had ordered the same from the company at its office in Chicago, Illinois, where said orders were accepted.

The Supreme Court of North Carolina (127 N. C. 521), in sustaining the lower court, stated its position in reference to the interstate commerce question in the following language:

> "If they had been completed in Chicago, and under contracts shipped to the purchaser, the title would have passed to the consignee upon delivery to the railroad in Chicago, the railroad being deemed the agent of the consignee. * * * But, instead of completing the pictures in Chicago and shipping them to the parties who had contracted for them, they were shipped to itself (the Chicago Portrait Company) at Greensboro. This being so, no title ever passed from the Chicago Portrait Company until the pictures were put in the frames and delivered by the defendant. * * * We are therefore of the opinion

> that * * * defendant was engaged in the business of selling and delivering picture frames in the city of Greensboro; and as we are not able to see how the enforcement of this ordinance interferes with interstate commerce the judgment of the court below is affirmed."

The case was before this Court on writ of error on the ground that the ordinance in question violated the commerce clause of the Federal Constitution. The United States Supreme Court, in reversing the North Carolina court, speaking through Mr. Justice Shiras, said:

> "Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. *It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation.* The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail, and were received at the railroad station by an agent who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate."

See also *Rossi* v. *Pennsylvania*, 238 U. S. 62.

(b) Liquor shipped from one state, where the order is accepted, to another state, C. O. D., is a sale made in the state from which the goods are shipped and not the state in which goods are received.

This law is now definitely settled by numerous cases.

American Express Co. v. *Iowa*, 196 U. S. 133.
Norfolk & W. R. R. v. *Sims*, 191 U. S. 441.

This same rule has been held to apply when the shipment is made from one county of a state to another county of the same state.

State v. *Rosenberger*, 212 Mo. 648.

In this case Judge Burgess, overruling his own *dicta* previously announced by him in *State* v. *Wingfield*, 115 Mo. 437, says, among other things, on page 657, the following:

> "The great mercantile interests of the country seem to demand that the law by which such interests are governed should be uniform, and we are of opinion that, so far as concerns the title to goods delivered to a carrier for shipment, the same rule applies to C. O. D. shipments as to those in ordinary cases, in the absence of any express contract to the contrary between the shipper and the consignee."

(c) The transactions in the instant case occurred in February, 1907. Thereafter, on March 4th, 1909, Congress adopted a new penal code (35 Stat. L. 1136, Fed. Stat. Ann. Supp. 1909, p. 473) making C. O. D. liquor shipments by railroad companies, express companies or common carriers between states unlawful. A decision by this Court that the Texas statutes can regulate interstate C. O. D. shipments must mean that Congress has attempted to exercise a power it does not possess.

The statute passed by Congress March 4, 1909, is as follows:

> "Sec. 239. (Common carriers, etc., not to collect purchase price of interstate shipment of intoxicating liquors.) Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, shall collect the purchase price or any part thereof, before, on or after delivery, from the consignee, or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined not more than five thousand dollars. (35 Stat. L. 1136.)"

(d) C. O. D. Contracts for the shipment of liquors from one state to another pursuant to bona fide orders accepted in the state where the liquor is delivered to the carrier are within the protection of the commerce clause of the Federal Constitution independently of whether such contracts are imposed on a carrier as a common law duty or are voluntarily assumed.

Whether C. O. D. contracts are protected by the commerce clause of the Federal Constitution is a question of constitutional law; whether such contracts must be assumed by a carrier involves a question of the common law or statutory duty of a common carrier. These two questions are determined by entirely different considerations and principles of law.

The commerce clause was made a part of the Federal Constitution because its framers desired that commercial intercourse between the citizens of the several states should be free from and untrammeled by local regulations and burdens, while the common law duties of a carrier arose from the public nature of its calling long before the Federal Constitution was adopted.

This Court in the cases hereinbefore cited recognized this class of contracts to be free from state regulation.

In *Heymann* v. *Southern Ry. Co.*, 203 U. S. 270, 51 L. Ed. 178, Mr. Justice White, delivering the opinion of the court, said:

> "As the general principle is that goods moving in interstate commerce cease to be such commerce only after delivery and sale in the original package, and as the settled

> rule is that the Wilson Law was not an abdication of the power of Congress to regulate interstate commerce, since that law simply affects an incident of such commerce by allowing the state power to attach after delivery, and before sale, we are not concerned with whether, under the law of any particular state, the liability of a railroad company as carrier ceases and becomes that of a warehouseman on the goods reaching their ultimate destination, before notice and before the expiration of a reasonable time for the consignee to receive the goods from the carrier. For, whatever may be the divergent legal rules in the several states concerning the precise time when the liability of a carrier, as such, in respect to the carriage of goods, ends, they cannot affect the general principle as to when an interstate shipment ceases to be under the protection of the commerce clause of the Constitution, and thereby comes under the control of the state authority."

The views herein advanced are further fortified by those cases which hold that collect-on-delivery contracts are exempt from state regulation where the collecting agent was not a carrier at all.

Dozier v. *Alabama*, 218 U. S. 124, 54 L. Ed. 965.

Caldwell v. *North Carolina*, 187 U. S. 622, 47 L. Ed. 336.

In *Dozier* v. *Alabama, supra*, the plaintiff in error was convicted for selling picture frames in violation of an Alabama statute which imposed

a license tax on persons who did not have a permanent place of business in the state and also kept picture frames as part of their stock in trade if they solicited orders for photographs or pictures of any character or for picture frames whether they made charge for same or not, or if they sold or disposed of frames. The Chicago Crayon Company solicited orders in Alabama without paying the license tax.

> "These orders were given in writing for a portrait of the size and kind wanted, specified the price, cash on delivery, and continued: 'I understand that my portrait is to be delivered in an appropriate frame, which this contract entitles me to accept at factory price.'"

These orders were duly accepted. The plaintiff in error, who had paid no license tax, was an agent of the company who handled pictures and frames and collected for them in pursuance of the agreed plan. The pictures and frames were sent to the agent and remained the property of the company until paid for and delivered. Mr. Justice Holmes, delivering the opinion of the court, said:

> "What is commerce among the states is a question depending upon broader considerations than the existence of a technically binding contract, or the time and place where the title passed. It was agreed that the frame should be offered along with the picture. The offer was a part of the interstate bargain, and as it was agreed that the frame should be offered 'at factory prices,' and the com-

> pany and factory were in Chicago, obviously it was contemplated, if not agreed, that the frame should come on with the picture. In fact, the frames were sent on with the pictures from Chicago, and were offered when the pictures were tendered, as part of a transaction commercially continuous, and one at prices generically fixed by the contract for the pictures, and by that contract represented to be less than retail or usual prices, in consideration, it is implied, of the purchase already agreed to be made. We are of the opinion that the sale of the frames cannot be so separated from the rest of the dealing between the Chicago company and the Alabama purchaser as to sustain the license tax upon it. Under the decisions, the statute, as applied to this case, is a regulation of commerce among the states, and void under the Constitution of the United States."

That the decision in the instant case is not based on a difference in fact, but on a difference between the views of this Court and the views of the writer of the opinion in this case in the Supreme Court of Missouri is shown by his concurring opinion in *Kansas City* v. *McDonald*, — Mo. —, 175 S. W. 917, 920, wherein he disapproves of the reasoning of this Court in the Dozier case.

It is submitted that the foregoing cases conclusively establish the fact that the nature of the obligation of the medium which undertakes to perform a C. O. D. contract has nothing to do with whether such a contract is free from state regulation. Whoever assumes to deliver and collect is merely an instrumentality employed in

the carrying out of an interstate commerce transaction, and while so employed is within the protection of the commerce clause of the Federal Constitution. The language of Mr. Justice Shiras in *Caldwell* v. *North Carolina*, 187 U. S. 622, 47 L. Ed. 336, is apt:

> "Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail, and were received at the railroad station by an agent who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate."

(e) The Texas Act being unconstitutional in so far as it applied to interstate commerce afforded the defendant no excuse for its failure to perform its contracts to ship and collect.

> "A void act is neither a law nor a command. It is a nullity. It confers no authority. It affords no protection. Whoever seeks to enforce unconstitutional statutes, or to justify under them, or to obtain his claim

through them, fails in his defense and in his claim of exemption from suit."

Hopkins v. *Agricultural College*, 221 U. S. 636, 644, 55 L. Ed. 890, 895.

"An unconstitutional act is no law at all."

Williams v. *Railroad*, 233 Mo. 666, 681.

In *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70, 56 L. Ed. 355, the railroad company was enjoined from refusing to accept beer for transportation from Evansville, Indiana, to local option points in Kentucky. The railroad company had refused such shipments because they were in violation of the local option statutes of the state of Kentucky. This Court, in holding such statute unconstitutional insofar as it affected interstate commerce, through Mr. Justice Lurton, said:

"Valid as the Kentucky legislation undoubtedly was as a regulation in respect to intrastate shipments of such articles, it was most obviously never an effective enactment insofar as it undertook to regulate interstate shipments to dry points."

* * * * * *

"It is obvious, therefore, that insofar as the Kentucky statute was an illegal regulation of interstate commerce, it neither imposed an obligation to obey, nor affords an excuse for refusal to perform the general duty of the railroad company as a common carrier of freight."

In *Bowman* v. *Chicago & N. W. R. Co.*, 125 U. S. 564, 31 L. Ed. 700, the railroad company was sued for damages because it refused to receive liquor to be shipped from Illinois into Iowa. The defendant pleaded the Iowa prohibitory law as a defense. The plaintiff demurred to this plea on the ground that the Iowa statute was in conflict with the commerce clause of the Federal Constitution and therefore void. This Court held that the plaintiff's demurrer should have been sustained; that the Iowa statute insofar as it affected the interstate commerce transaction in question was unconstitutional and afforded defendants no excuse for their failure to receive and ship the plaintiff's liquor.

Conclusion.

According to the unbroken line of decisions of this court the Texas statute of Feb. 12, 1907, was an interference with interstate commerce, and therefore invalid as applied to the shipments in controversy, and constituted no excuse for defendant's failure to deliver the shipments in controversy. The judgment of the Supreme Court of Missouri should therefore be reversed.

Respectfully submitted,

FRANK F. ROZZELLE,
J. J. VINEYARD,
A. F. SMITH,
Attorneys for Plaintiff in Error.

Kansas City, Mo., January 24, 1916.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 249

ABRAM ROSENBERGER, *Plaintiff in Error,*

vs.

PACIFIC EXPRESS COMPANY, *Defendant in Error.*

REPLY BRIEF OF PLAINTIFF IN ERROR.

FRANK F. ROZZELLE,
J. J. VINEYARD,
A. F. SMITH,
Attorneys for Plaintiff in Error.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 249

ABRAM ROSENBERGER, *Plaintiff in Error,*

vs.

PACIFIC EXPRESS COMPANY, *Defendant in Error.*

REPLY BRIEF OF PLAINTIFF IN ERROR.

I.

In paragraph III (p. 24 *et seq.*), of its brief, defendant argues that the record does not show that plaintiff in error had a Missouri license to sell liquors, and therefore he can not recover in this case. This point is without merit, for the following reasons, amongst others:

1. Non-compliance with a license law is a matter of defense to be pleaded in bar (United Shoe Machinery Co. vs. Ramlose, 210 Mo., 631, 649 *et seq.*). No such issue was made in defendant's answer (Transcript, p. 10). No evidence was offered tending to show that plaintiff was not duly licensed. On the contrary it was admitted that the goods were shipped "in accordance with bona fide orders," and that until February 12, 1907, the date of passage of the Texas statute, the defendant stood ready and was willing to deliver to all consignees who might call and pay the proper charges on the liquor shipped (Transcript, p. 15). The point was not raised or considered in the Missouri Supreme Court.

2. The State of Missouri has no more right than the State of Texas to interfere with interstate commerce by the imposition of license fees affecting such commerce.

3. The Missouri statutes were intended to apply to local and not interstate transactions (Osborne vs. Florida, 164 U. S., 650, 653, 654; Kehrer vs. Stewart, 197 U. S., 60, 65).

4 Defendant has no right to question the validity of a contract of sale between plaintiff and his consignees.

II.

In paragraph V (p. 32, *et seq.*) of its brief, defendant argues that plaintiff's cause of action is for breach of contract and not in conversion. This point is answered by the authorities cited (p. 6) in the brief and argument of plaintiff in error in opposi-

tion to the motion of defendant in error to dismiss writ of error herein, and it has been decided against defendant in the overruling of that motion.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

No. 749.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

ABRAM ROSENBERGER, PLAINTIFF IN ERROR,

vs.

PACIFIC EXPRESS COMPANY, DEFENDANT IN ERROR.

STATEMENT AND BRIEF OF DEFENDANT IN ERROR.

J. L. MINNIS,
I. N. WATSON,
Attorneys for Defendant in Error.

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CITATIONS.

No. 249.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

ABRAM ROSENBERGER, PLAINTIFF IN ERROR,

VS.

PACIFIC EXPRESS COMPANY, DEFENDANT IN ERROR.

STATEMENT AND BRIEF OF DEFENDANT IN ERROR.

This is a suit in conversion. In 1907, plaintiff in error was engaged in business in Kansas City, Missouri, as a liquor dealer. He conducted his business by taking orders from different persons residing in different states, for one gallon of liquor and would ship the same "C. O. D." in one-gallon packages to the parties ordering the same. During the period commencing January 12th, 1907, and ending February 11th, 1907, inclusive, the plaintiff in error delivered to the defendant in error for shipment "C. O. D." to certain points in Texas certain packages described in his petition each containing one gallon of intoxicating liquors, which the plaintiff in error claims the defendant in error has converted to its own use and he is seeking to recover the value thereof in this action.

The petition sets out each shipment, the date thereof, the consignee thereof, the quantity of liquor shipped and the value thereof, but the itemized statement is not set forth in this record. There was no contention about the correctness of the statement of the account or the value of the liquor in controversy in this ac-

tion. This transcript of record is very incomplete, but the Supreme Court of the State of Missouri had the entire record before it when that court handed down the opinion in this case, and, after reviewing the record lodged in that court, expressed its conclusion of what the record showed in the following language (See Transcript of Record, 33):

> "And no fair-minded, disinterested man can read this record without reaching the conclusion that the "C. O. D." contract mentioned in this case was resorted to in order to sell intoxicating liquors in the State of Texas in violation of the laws thereof; and in order to meet this evil the Statute of 1907 was by the legislature of that state enacted, and not for the purpose of interfering with state or interstate commerce."

The abstract of the record filed in the Supreme Court of Missouri showed that the plaintiff in error sent all liquor in controversy to persons residing in the State of Texas, and that the shipments arrived in the regular course of business at the points of destination, and that the defendant in error at all the times mentioned sent written notice, properly stamped and addressed, to all consignees of the arrival of said packages of liquor, so consigned to them (See Transcript of Record, 15). The record, also, shows that up to February 12th, 1907, the defendant in error, by its local agents at all points of destination in Texas, was ready and willing to deliver such intoxicating liquor to all consignees who called at the destination office of defendant in error and paid or offered to pay or tendered the proper "C. O. D." charges thereof.

The contract, under which these liquors were shipped, is found in the transcript of record, page 18, 19 and 20. The third paragraph of this contract provided that the company should not be liable for loss, damage or delay "by the act of God * * *, by restraints of Government," etc. The contract further provided, in paragraph 5, that the express company was "not to be held liable or responsible for any loss of, or damage, to, said property or any part thereof from any cause whatever, unless in every case the said loss or damage be proved to have occurred from fraud or gross negligence of said Company or its servants." Paragraph 6 of said contract provided as follows:

> "If any sum of money beside the charges for transportation is to be collected from the consignee on delivery of the above described property and the same is not paid, or if in any

case the consignee cannot be found or refuses to receive such property, *or for any other reason it cannot be delivered,* the shipper agrees that this Company may return said property to him subject to the conditions of this receipt and that he will pay all charges for transportation, and that the liability of this Company for such property while in its possession for the purpose of making such collection, shall be that of a Warehouseman only."

And, by paragraph 9, the contract provided that "in consideration of the rate of freight to be charged, that the Pacific Express Company shall not be required to make free delivery of the property above mentioned, to the consignee at any station where no voluntary free delivery service is maintained by said Company." The tariff filed with the Interstate Commerce Commission, and in force at the times the shipments sued for were made, provided that "each return shipment 'C. O. D.' must be charged the same amount as was charged for the outward shipment, except that when two or more shipments are ordered back by the same shipper, from the same place, at the same time, such return packages may be aggregated as provided in Rule 7" (Abstract, 23). The tariff, also, provided:

> "If 'C. O. D.' matter is refused or cannot be delivered within 24 hours, the shipper must be immediately notified, and if not disposed of within thirty days of such notice, it may be returned subject to charges both ways. If the shipper, after receiving notice of non-delivery from destination agent, requests that the shipment be held for a further period, it may be granted, but it must not be held longer than 60 days after date of shipment, and forwarding agents are forbidden to make any agreement with shippers to hold the goods for a longer period."

The tariff, also, provided that "the shipper may order packages returned in a less period than thirty days," and that "C. O. D. packages that have been forwarded from one point to another, on order of shipper may be held for thirty days from date of reshipment" (Abstract of Record, 22).

On February 12, 1907, the legislature of the State of Texas passed an act imposing an occupation tax on persons, firms or corporations handling liquors C. O. D. This law is set out in abstract of the record, page 23. This law took effect immediately after its passage, on the 12th day of February, 1907. The defendant in error at once notified its agents to make no C.

O. D. deliveries at any point in the State of Texas. The license fee charged for each office in the State of Texas was $5,000 to the state and any county or any incorporated city or town was authorized to levy one-half the amount levied by the state, thus making the annual license tax $10,000 for each office where liquors were delivered in C. O. D. packages. The record in the Supreme Court of the State of Missouri shows the number of offices in the State of Texas maintained by defendant in error where intoxicating liquors shipped C. O. D. were delivered. The amount required to be paid as such license tax for all the offices in the State of Texas would be largely in excess of the entire revenue from all business done in the State of Texas. Upon the passage of this law, the defendant in error notified plaintiff in error that it would make no more C. O. D. deliveries of intoxicating liquors, but that it was willing to deliver the packages without collecting the purchase price, but plaintiff in error refused such offer and insisted on the defendant in error carrying out its contract of shipment and delivering the packages to the consignee and that it collect C. O. D. charges, which it refused to do. Defendant in error thereupon ordered its agents to return all liquors to Kansas City and it charged for such return under the provisions of its tariff heretofore quoted. All liquors were returned to Kansas City and tendered to the plaintiff in error and return charges demanded, but he refused to pay such charges and to accept such goods, and the defendant held the same for the use of the plaintiff, thereupon plaintiff brought this suit in conversion. There was no evidence offered to show that any of the consignees mentioned in the petition would have called and paid the purchase price and accepted the liquors.

The agreed statement of facts, states that after February 12th, if "any of the consignees of said liquor mentioned in plaintiff's petition, had called at the proper office of defendant and had tendered the defendant the proper C. O. D. charges on the liquor shipped to him and had offered to accept the same, delivery thereof C. O. D. would have been refused by defendant." There was no evidence offered to show that any consignee ever called after February 12th, 1907, and offered to pay the C. O. D. charges and receive the package of liquor (Transcript of Record, Page 15). The trial court rendered judgment for plaintiff in error, and in due time defendant in error prosecuted an appeal to the Supreme Court of Missouri, where the appeal was heard and the judgment of the trial court was reversed. Thereupon plaintiff in error sued out this writ of error from this court and the case was brought to this court and there is no assignment of error to the ruling of the Supreme Court of Missouri that conversion would not lie under the facts disclosed in this record.

BRIEF AND ARGUMENT.

I.

The judgment of the Supreme Court of Missouri, reversing the judgment of the trial court was based upon two propositions: First, that the statute of Texas offered in evidence was a valid exercise of the police power and constituted a justification for the refusal of defendant in error to collect the C. O. D. charges; Second, because the undisputed evidence shows that if the defendant in error was liable to the plaintiff in error in any manner it was for a breach of the C. O. D. contract and not for a conversion of the goods.

Plaintiff in error contends that the Supreme Court of Missouri erred in holding that the statute of Texas, February 12th, 1907, was a valid exercise of the police power of the state insofar as it affected, applied to, or controlled interstate C. O. D. shipments of original packages of liquor shipped from the State of Missouri to the State of Texas, and that the statute was in violation of the provision of the Constitution vesting in Congress the exclusive jurisdiction and control of interstate commerce. There is no assignment of error challenging the correctness of the ruling of the Supreme Court of Missouri on the second contention, to-wit, that if plaintiff in error had any right of action it was for violation of its contract in refusing to collect the purchase price of the liquor shipped by plaintiff in error and not an action for conversion. So that the only assignment of error before this court is whether or not the Texas statute was a valid exercise of the police power of the state, as applied to these C. O. D. shipments of intoxicating liquors. The Supreme Court of Missouri speaking of the record in this case in the said court say: "No fair-minded disinterested man can read this record without reaching the conclusion that the C. O. D. contract mentioned in this case was resorted to in order to sell intoxicating liquors in the State of Texas in violation of laws thereof; and in order to meet this evil the statute of 1907 was by the legislature of that state enacted, and not for the purpose of interfering with state or interstate commerce" (See Transcript of Record, page 33). This record shows that the defendant in error was willing at all times to deliver these pack-

ages of liquor to the consignees if plaintiff in error would release it from collecting the C. O. D. charges. It, also, offered to hold the liquor a sufficient length of time to enable the plaintiff in error to make arrangements through other agencies to collect the purchase price of the liquor shipped. These offers were refused by the plaintiff in error. Thereupon, the defendant in error returned the packages to plaintiff in error, as provided by its contract and its tariff on file with the Interstate Commerce Commission (See Transcript of Record, pages 19 and 22). Plaintiff in error refused to accept the return of these packages of liquor, but stated that he would have accepted them if they had been delivered to him free of charge and that he requested the return of these shipments free of charge (See Transcript of Record, page 21).

II.

While intoxicating liquors are recognized as a legitimate subject of interstate commerce, yet such liquors do not have the same rights which attach to the shipments of other commodities.

In the case of *Crowley* v. *Christensen*, 137 U. S. l. c. 91, this court said:

> "By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every state, considered as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day and the days of the week on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the state is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no inherent right

in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils."

In the case of *Delamater* v. *South Dakota*, 205 U. S. 93, this court passed upon the right of South Dakota to regulate or prohibit the business of soliciting orders from residents of that state for the purchase of intoxicating liquors in quantities less than five gallons from a firm in St. Paul, Minnesota. The plaintiff in error in that case solicited orders in the form of proposals to buy, and when accepted by his principal the liquors were shipped from St. Paul to the persons in South Dakota who made the proposals, at their risk and cost, on sixty days credit. At the time Delamater engaged in the business just stated, in South Dakota, the law of that state imposed an annual license charge upon the business of selling or offering for sale intoxicating liquors within the state by any travelling salesman who solicits orders by the jug or bottle in lots less than five gallons. A violation of the statute was made a misdemeanor punishable by fine or imprisonment or both in the discretion of the court. Delamater, not having paid the license charged, was prosecuted under the statute. He claimed that if the statute applied it was void because repugnant to the commerce clause of the Constitution of the United States. In passing upon the validity of this South Dakota statute, this court said:

"All the assignments of error involve the proposition that the state statute, as construed and applied by the court below, is repugnant to the commerce clause of the Constitution. It is manifest, as the subject dealt with is intoxicating liquors, that the decision of the cause does not require us to determine whether the restraints which the statute imposes would be a direct burden on interstate commerce if generally applied to subjects of such commerce, but only to decide whether such restraints are a direct burden on interstate commerce in intoxicating liquors as regulated by Congress in the act commonly known as the Wilson act, 26 Stat. L. 313, chap. 728. For this reason we at once put out of view decisions of this court, which are referred to in argument and which are noted in the margin, because they concerned only the power of a State to deal with articles of interstate commerce other than intox-

icating liquors, or which, if concerning intoxicating liquors, related to controversies originating before the enactment of the Wilson law."

And, again in the same case:

"It having been thus settled that under the Wilson act a resident of one state had the right to contract for liquors in another State and receive the liquors in the State of his residence for his own use, therefore, it is insisted the agent or traveling salesman of a non-resident dealer in intoxicating liquors had the right to go into South Dakota and there carry on the business of soliciting from residents of that state orders for liquor to be consummated by acceptance of the proposals by the non-resident dealer. The premise is sound, but the error lies in the deduction, since it ignores the broad distinction between the want of power of a State to prevent a resident from ordering from another State liquor for his own use and the plenary authority of a state to forbid the carrying on within its borders of the business of soliciting orders for intoxicating liquors situated in another state, even although such orders may only contemplate a contract to result from final acceptance in the state where the liquor is situated. The distinction between the two is not only obvious, but has been foreclosed by a previous decision of this court. That a state may regulate and forbid the making within its borders of insurance contracts with its citizens by foreign insurance companies or their agents is certain. *Hooper* v. *California*, 155 U. S. 648. But that this power to prohibit does not extend to preventing a citizen of one state from making a contract of insurance in another state is also settled."

After reciting extracts from *Nutting* v. *Massachusetts*, 183 U. S. 553; 175 Mass. 156, this court then say:

"As we have seen, the right of the states to prohibit the sale of liquor within their respective jurisdictions in and by virtue of the regulation of commerce embodied in the Wilson act is absolutely applicable to liquor shipped from one state into another after delivery and before the sale in the original package. It follows that the authority of the states, so far as the sale of intoxicating liquors within their borders is concerned, is just as complete as is their right to regulate within their jurisdiction the making of contracts of insurance. It hence must be that the authority of the states to forbid agents of non-resident liquor dealers from coming within their borders to solicit contracts for the purchase of intoxicating liquors which otherwise the citizen of the state 'would not

have thought of making,' must be as complete and efficacious as is such authority in relation to contracts on insurance, especially in view of the conceptions of public order and social well-being which it may be assumed lie at the foundation of regulations concerning the traffic in liquor."

We submit that if a state has the authority to prohibit agents of non-resident liquor dealers from coming within their borders to solicit contracts for the purchase of intoxicating liquors, then the state would certainly have authority to prohibit an agent acting in said state from collecting the purchase price of any liquor shipped into the state. It seems to us that the exercise of the power of the state in either instance would have the same effect upon interstate commerce. And this distinction has been recognized by the statute passed by Congress March 4, 1909, and known as Section 239 of the Criminal Code. This section provides:

"Sec. 239. Common Carriers, etc., not to collect purchase price of interstate shipments of intoxicating liquors.

Any railroad company, express company or other common carrier or any other person *who, in connection with the transportation of any spirits*, wines, malted, fermented or any other intoxicating liquor of any kind from one state, etc., into another state, etc., shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, save only in the actual transportation and delivery of the same, shall be fined not more than $5,000.00." (Italics ours).

Congress has defined what it meant by the term "transportation" in Interstate Commerce Act. (See Interstate Commerce Act Sec. 1, *Pennsylvania Railroad Co. v. United States*, 236 U. S. (1. c.) 362.

Congress by this act of 1909 expressly recognizes the fact that the collection of the purchase money is no part of the transportation and delivery of liquors enjoined by the Interstate Commerce Act or the Wilson Act. This section does not prohibit the transportation of intoxicating liquors as that term is used in the Interstate Commerce Act and the Wilson Act. (See Sec. 1, Interstate Commerce Act.) It is now perfectly legitimate under the act of 1909 for the Express Company to *transport* and *deliver* intoxicating

liquors, but it must not collect the purchase price. The act of Congress of 1909 does not refer in any way or manner to the act known as the Wilson Act, or the act known as the Interstate Commerce Act. It does not affect a straight consignment of liquor.

It does not purport to modify, alter or repeal the Wilson Act, neither does it change or modify the scope of the term "transportation" as used in the Interstate Commerce Act, and the rule is well established by numerous decisions of this court and other courts that "When there are two acts upon the same subject the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of repugnancy as a repeal of the first." *United States* v. *Tynen*, 11 Wallace, l. c. 92; *Henrietta Mining & Milling Co.* v. *Gardner*, 173 U. S. l. c. 128. There is no repugnancy in the provisions of these three acts so far as the same have been construed by this court. So that it is very apparent that Congress in passing Sec. 239 of the Criminal Code above mentioned did not intend to change or restrict the provisions of the Wilson Act, or Section 1 of the Interstate Commerce Act. In other words, Congress left *transportation* of intoxicating liquors subject to the provisions of the Wilson Act without any change whatever. Whatever was a legitimate part of *transportation* of intoxicating liquors before the passage of Section 239 remained a legitimate part of such transportation after the passage of said act, and whatever was legitimate "*transportation*" of intoxicating liquors under the Interstate Commerce Act before the passage of the Act of 1909, *supra* was legitimate transportation after the passage of said act. Said act uses the term "Who, in connection with the *transportation*" thus indicating that while collecting C. O. D. charges was connected with the transportation of intoxicating liquors, Congress did not consider it was a part of such transportation, and that "transportation" of intoxicating liquors could be continued just the same but the C. O. D. practice was prohibited. Congress attempted to correct an evil that had grown up with and attached itself to interstate transportation of intoxicating liquors, and Congress evidently did not intend to limit or change the meaning given to the term "transportation" in the previous acts but it did consider that this C. O. D. service was separate and distinct from "transportation" and no part thereof as that term is defined in Section 1 of the Interstate Commerce Act.

Congress evidently considered that it was no part of the duty of a common carrier under the law to collect the purchase price of intoxicating liquors transported in Interstate Commerce.

The general rule of law announced by text writers and various courts of last resort, was that such duty was not enjoined by law upon a common carrier. In Hutchinson on Carriers, 3 Ed. Section 726, it is said:

> "The carrier who accepts goods with such instructions undertakes that they shall not be delivered unless the condition of payment be complied with, and *becomes the agent of the shipper of the goods to receive such payments.* He therefore undertakes, *in addition to his duties as carrier,* to collect for the consignor the price of his goods" (italics our own).

In Section 728, the same author says:

> "The obligation to require payment for the goods as a condition of their delivery, does not arise from *the implied duty of the carrier. It must rest upon contract, either express or implied, from the circumstances*" (italics our own).

In *U. S. Express Co.* v. *Keifer*, 59 Ind. 263, it is said:

> "Where the goods are marked C. O. D., the contract of the common carrier, in connection therewith, is not only for the safe carriage and delivery of the goods to the consignee, but he further contracts with the consignor that he will 'collect on delivery' and return to the consignor the charges on said goods."

And by Section 729 of Hutchinson on Carriers, it is said:

> "When the carrier receives goods with such instructions, and carries them to their destination, if the consignee is not ready to pay for them immediately upon their being tendered to him, he must retain them a reasonable time to enable the consignee to obtain the means to do so."

In Elliott on Railroads, Vol. 4, Section 1530, it is said:

> "The common carrier is not obliged to collect or require the payment of the purchase price of goods offered to it for *transportation* before delivering them to the purchaser under its common law duties" (italics our own).

In A. & E. Encyclopedia of Law, 2 Ed. Vol. 12, page 533, it is said:

> "There is no common law liability devolving upon an express company to act as the collecting agent of the shipper. Such obligation arises only by *contract, express or implied.*"

In *Cox et al.* v. *Rd. Co.*, 91 Ala. 392, 8 Sou. 824, it is held:

"From his mere avocation, or the nature of his business, no implied obligation or duty devolves upon a common carrier to require the payment of goods transported by him as a condition for their delivery. *Such obligation arises only by contract, express or implied.*"

And, in *Express Co.* v. *Commonwealth*, 29 Ky. Law Rep. 524, it is said:

"*There is no common law duty devolving upon a common carrier to act as a collecting agent for the consignor. That is a matter of private contract and one which the carrier may enter into or refuse at its option.* When it does make such a contract, it stands with reference to it just as any other agent."

In Moore on Carriers, Section 31, it is said:

"Where goods are sent, with instructions not to deliver them until they are paid for, the carrier, who accepts the goods with such instructions, undertakes not to deliver them unless the condition of payment is complied with. *In addition to its obligation as a carrier, it becomes the agent of the consignor to collect and receive the price of the goods and return the money to the consignor. This obligation or duty is not one arising or implied from the nature of its business, but it is based on contract, express or implied.*"

In Hale on Bailments and Carriers, page 451, it is said:

"When goods are received by a carrier for transportation, the C. O. D. contract of the carrier in connection therewith is not only for the safe carriage and delivery of their goods, to the consignee, but there is a further agreement to 'collect on delivery' and return to the consignor the amount so received. *The common law places no obligation on a common carrier to do C. O. D. business. Such obligations are assumed only by contract.*"

In *McNichol* v. *Express Co.*, 12 Mo. App. 401, it is said:

"*So far as we know, there is no common law duty upon the carrier to act as collecting agent for the shipper. The law does not attach any peculiar liability to such office when it assumes it such as attaches to its office of public carrier.* When he undertakes such duty, his liability is the same as a bank, attorney at law, or any other collecting agent, and it arises upon the special contract by which he undertakes the duty and not upon the ancient custom which is the foundation of his peculiar liability as a carrier."

And in *Fowler Commission Co.* v. *Rd.*, 98 Mo. App. 210, in speaking of C. O. D. shipments, it is said:

> *"In the former instance, there is no common law liability to become the shipper's agent to collect the purchase money, and he is only liable by reason of a breach of an implied contract that he will collect before delivery.* Hutchinson on Carriers' Section 391. In the latter case, the liability arises from a breach of a duty to safely ship and deliver."

In the case of *Danciger* v. *Pacific Express Co. and Wells Fargo & Co.*, 154 Fed. 379, the plaintiffs in that case asked for a mandatory injunction compelling these appellants to accept and carry liquor C. O. D. These appellants contended that it was no part of their duty as common carriers to accept such shipments and it was therefore no part of interstate commerce to accept and carry commodities C. O. D. In that case, it was held as a general rule of law that a carrier can only be compelled to perform a duty imposed on it by law, and that there is no common law duty resting upon the carrier to carry C. O. D. shipments. And this was so under the Interstate Commerce Act. In this case, it is said:

> "Does the law compel the defendants to perform the services demanded by complainants? It must be observed the defendants have not denied, and do not now deny, *the right of complainants to require them to carry interstate shipments of intoxicating liquors to any point reached by the defendants' lines, whether such points be within states where the sale of intoxicating liquors is prohibited or not. The sole question here raised is the right of the complainants to insist on the defendants carrying their C. O. D. shipments of liquor on complaints tendering or paying the lawful charges demanded by defendants. Is such duty imposed upon the defendant by the law?"* (Italics our own.)

And the court, after quoting a number of decisions, says:

> "Laying aside the briefs presented in this case, and regarding the questions presented in their legal aspect alone, I am so strongly inclined to the opinion that the ultimate holding in the case on final decree must be that the rights complained of by complainants and here sought to be enforced are *not obligations imposed on the defendants at law, but such matters as rest in contract and, being such, the defendants may undertake the performance of the service for complainants or not as they deem fit, etc."*

Congress recognized that it was a well established rule that it was no part of the duty imposed by law upon appellant as a common carrier to collect the purchase price of goods transported in interstate commerce; that, in collecting the purchase price, the carrier was acting simply as the agent of the consignor.

What is legitimate interstate commerce, which is within the sole jurisdiction of congress and not subject to police power of the state, has been clearly stated by this court in the case of *Cooley v. Board of Port Wardens*, 12 Howard, 299, as follows:

> "Commerce with foreign countries and among the states, strictly considered, *consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property as well as the purchase, sale and exchange of the commodity*. For the regulation of commerce as thus defined there can be only one system of rules applicable alike to the whole country and the authority which can act for the whole country can alone adopt such system. Action upon it by separate states is not therefore permissible" (italics our own).

In the same case in speaking of the powers of congress to regulate commerce, this court also said:

> "Some of them are national in their character and admit uniformity of regulation affecting alike all the states; others are local or are mere aids to commerce and can only be properly regulated by provisions adapted to special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the states, which consists in the transportation, purchase, sale and exchange of commodities. Here there can of necessity be only one system or plan of regulation, and that, congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free."
>
> "The substance of the sale is the agreement to sell and its acceptance." *Norfolk & West. Ry. Co. v. Sims*, 191 U. S. (l. c.) 447. And in *Adams Express Co. v. Iowa*, 196 U. S. (l. c.) it is said, "While technically the title of the machine may not have passed until the price was paid, the sale was actually made in Chicago and the fact that the price was to be collected in North Carolina is too slender a thread upon which to hang an exception of the transaction from a rule which would otherwise declare the tax to be an interference with interstate commerce."

The same doctrine is announced in *Rhodes* v. *Iowa*, 170, U. S. 412. In *Adams Express Co.* v. *Kentucky*, 206 U. S. 129 it was held that the sale took place in Ohio.

In *Kirmeyer* v. *Kansas*, 236 U. S. 568, the orders were received and accepted in Missouri, but the beer was delivered in Kansas, and the collections were usually made by the drivers and it was ruled that the sale was in Missouri, and the transaction constituted Interstate Commerce.

Hence the sale of these goods took place in Missouri and the transportation of same to Texas, which included delivery did not include collection of the purchase price, therefore the Act of 1909 did not prohibit such sales, nor such transportation, but congress did prohibit this practice of the collection of C. O. D. charges in connection with such sale and transportation. If the Act of Congress of March, 1909, did not prohibit the essential parts of a sale, and "transportation" as that term is defined in the above Acts of Congress, then the Statute of Texas did not interfere with these essential elements of Interstate Commerce in liquors, because it did not attempt to prohibit all sales and delivery of intoxicating liquors, but it only prohibited collection of the purchase price. This statute did not prohibit a sale of liquor in Missouri, and consigned to the purchaser in Texas where no part of the purchase price was collected. The law of Texas was in aid of legitimate transportation of intoxicating liquors as defined by Congress in the act above mentioned and not a prohibition of the transportation of liquors as that term is used in the Interstate Commerce Act. This law of Texas was not a regulation directly affecting interstate commerce in an essential and vital point. Under that law plaintiff in error could sell and transport liquors to his customers in Texas just the same as he can since the passage of the Act of Congress of 1909. These essential elements of interstate commerce are not affected by said law of Texas.

In the license cases, 5th Howard, 504-509, in speaking of the police power reserved to the states and its relation to the power granted to congress to regulate commerce between states, this court said:

> "The assumption is that the police power was not touched by the constitution, but left to the states, as the constitution found it. This is admitted; and whenever a thing, from character or condition is of a description to be regulated by that

power in the state, then the regulation may be made by the state and Congress cannot interfere. * * * And the fact must find its support in this, whether the prohibited article belongs to, and is subject to be regulated as part of foreign commerce or of commerce among the states. * * * And as an incident to this power a state may use means to ascertain the fact. And here is the limit between the sovereign power of the state and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state; and that which does belong to commerce is within the jurisdiction of the United States."

In the case of *Railroad Company* v. *Husen*, 95 U. S. 465, this court said:

> "While we unhesitatingly admit that a state may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, *it may not interfere with transportation into or through the state, beyond what is absolutely necessary for its self protection.*"

In the case of *Wabash, etc. Rd. Co.* v. *Illinois*, 118 U. S. 557, 572, this court said:

> "It cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the state might choose to impose upon it, that the commerce clause was intended to secure. * * * And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation or any other restrictive regulation interfering with and seriously embarrassing this commerce."

In the case of *Bowman* v. *Ry. Co.*, 125 U. S. 465, this court held that a statute of Iowa, which prohibited the importation of intoxicating liquors into the state, was void, because the exclusive

power to regulate the transportation of intoxicating liquors in interstate commerce belonged to Congress. In passing upon the validity of this statute, this court said:

> "It is not an exercise of the jurisdiction of the state over persons and property within its limits. On the contrary, it is an attempt to exert that jurisdiction over persons and property within the limits of other states. It seeks to prohibit and stop their passage and importation into its own limits and is designed as a regulation for the conduct of commerce before the merchandise is brought to its property. It is not one of those local regulations designed to aid and facilitate commerce. * * * It is, on the other hand, a regulation directly affecting interstate commerce in an essential and vital point. * * * It is, therefore, a regulation of that character which constitutes an unauthorized interference with the power given to Congress over the subject."

And, again, this court says:

> "The argument is that a prohibition of the sale cannot be made effective, except by preventing the introduction of the subject of the sale; that if its entrance into the state is permitted, the traffic in it cannot be suppressed. But the right to prohibit sales, so far as conceded to the states, arises only after the act of transportation is terminated, because the sales which the state may prohibit are all things within its jurisdiction."

In the case of *Rhodes* v. *Iowa*, 170 U. S. 412, this court again passed upon a statute of Iowa regulating transportation of intoxicating liquors which was similar to the one involved in the Bowman case. After referring to the decision in the Bowman case, this court said (l. c. 415):

> "It was decided that the transportation of merchandise from one state into and across another was interstate commerce, and was protected from the operation of said laws from the moment of shipment whilst in transit and up to the ending of the journey by the delivery of the goods to the consignee at the place to which they were consigned."

In the case of *Heyman* v. *Southern Ry. Co.*, 203 U. S. l. c. 277, this court quoted the following language from the case of *Vance* v. *Vandercook Co.*, No. 1, 170 U. S. 438:

> "If they (the goods) were still in the course of interstate transportation, the seizure by the constable was not even

prima facie legal, for the very law under which the seizure was made had, prior to such seizure, been declared by the Supreme Court of the United States to be unconstitutional in so far as it interfered with interstate commerce. *Scott* v. *Donald*, 165 U. S. 58. It, therefore, follows that if the shipment had not been completed at the time the goods were seized, the railroad company would have no right to defend on the ground that it submitted to the superior authority, granting that such a defense, if established, would relieve it from liability."

The foregoing authorities decide that the essential elements of interstate commerce, which are under the exclusive control of Congress, are "intercourse and traffic, including in these terms navigation and the transportation" of persons and property and the purchase, sale and exchange of commodities. The "transportation" of liquors, as used in the Interstate Commerce Act, and the Act of Congress of March 4th, 1909, does not include the duty of collecting the purchase price of articles transported in such commerce. Hence Congress evidently did not intend by this Act to prohibit Interstate Commerce in intoxicating liquors, as that term is defined in *Cooley* v. *Port Wardens, supra.* Congress expressly determined by this last act that the term "transportation" did not include services of collecting the purchase price, because it expressly provides that any common carrier *who in connection with the transportation of intoxicating liquors shall collect the purchase* price shall be guilty of a misdeameanor. Congress thereby put a construction on the Wilson Act and the Interstate Commerce Act, and declared that the collection of the purchase price of intoxicating liquors was no part of the *transportation* as that term is used in said acts. Taking the Act of Congress of March 4th, 1909, and the Interstate Commerce Act, and the Wilson Act, as those acts are construed by this court, it is clear that the legitimate transportation of intoxicating liquors protected by said acts is the transportation and delivery of such commodity to the consignee and that the collection of the purchase price was not a part of the transportation of such commodity. If we are right in this contention then the regulation or prohibition of such act did not belong to Congress exclusively, but in the absence of Congressional Legislation on that subject the states were free to act until Congress assumed control over such matter.

Northern Pac. Ry. v. *Washington*, 222 U. S. 370.

The act of the State of Texas in question does not prohibit the sale, transportation and delivery of intoxicating liquors into the State of Texas, but it only prohibits the defendant from acting as a collection agent for the collection of the C. O. D. charges. In shipping liquors C. O. D. the consignor simply puts a prohibition upon delivery, until certain money is paid, but there is a recognized difference between delivering intoxicating liquors and collecting the purchase price. This statute of Texas does not affect delivery of intoxicating liquors at any office where liquors are not shipped C. O. D. in interstate commerce to consignees residing in Texas. The defendant offered to make the delivery of these packages of liquor in controversy to the consignees if the plaintiff would waive the collection of the purchase price, which service the defendant assumed to render to the plaintiff by its special contract. It is clear from the foregoing acts of Congress and authorities herein cited, that the sale and transportation of intoxicating liquors can be carried on under the Texas Statute without interfering with legitimate Interstate Commerce as now permitted under said acts of Congress, and that the C. O. D. feature was not any service required by law, but was a duty assumed wholly by contract, and as it did not form a part of the sale and delivery of intoxicating liquors which the carrier was bound to render all shippers as provided for by law, the regulation of such a contractual duty was not under the exclusive jurisdiction of Congress. It was a proper subject for the state to regulate by its police power, and the State of Texas had a right to prohibit that part of the service which was assumed by the private contract between the parties. We submit that under the interstate commerce Act defendant in error had to perform the same services for all shippers under like circumstances and conditions, and it was only such duties as were enjoined on the carrier by law which constituted the exclusive jurisdiction of Congress over such commerce. But there was no provision in any of the acts of Congress aforesaid which made it the duty of carriers to accept and transport liquors C. O. D. and it was optional with the carrier whether or not it accepted such duty and obligation. And we submit that it was only such duties imposed by law that constituted Interstate Commerce in the sense that Congress had exclusive control thereof, and that the right to act as a collection agent for the shipper was not a part of such commerce over which Congress retained complete control. If not, then until such time as Congress did assume

complete control the states had a right to exercise the police power of the state.

See *N. P. Ry. Co.* v. *Washington, supra.*

In all the cases cited by the plaintiff in error, the statutes of the state prohibited the sale and transportation of liquor into the state, and the statutes did not pretend to regulate the conduct of any agent acting for the consignor within the state.

In the case of *State of Iowa,* v. *Rhodes, supra,* the act expressly prohibited the express company from transporting liquor into the state of Iowa. The Supreme Court in the Rhodes case reviews the former decision of this court in the case of *Bowman* v. *Railway Co.,* 125 U. S. 465, and in speaking of the statute of Iowa under which the Bowman case arose, this court said:

> "In other words the statute which was under review in the Bowman case provides, 'If any express company, railway company or any agent or person in the employ of any express company or of any common carrier, or if any other person shall knowingly bring within this state or transport or convey between points or from one place to another within the state' whilst the statute now provides exactly the same thing, except that the words 'knowingly bring within this state' are omitted. It is hence manifest that the present statute as interpreted by the Supreme Court of Iowa has exactly the significance it would have did it contain the words found in the exact review in the Bowman case."

And again this court say:

> "The fundamental right which the deci ion in the Bowman case held to be protected from the operation of state laws by the constitution of the United States was the continuity of the shipment of goods coming from one state into another from the point of transmission to the point of consignment, and the accomplishment there of the delivery covered by the contract. The protection of the constitution of the United States is plainly denied by the statute now under review as its provisions are interpreted by the court below. The power which it was held in the Bowman case the state did not possess was that of stopping interstate shipments at the state line by breaking their continuity and intercepting their course from the point of origin to the point of consignment."

In the case of *American Express Co.* v. *Iowa,* 196 U. S. 133, the express company had received at Rock Island, Illinois, four

boxes of merchandise to be carried to Tama, Iowa, and to be there delivered to four different persons, one package being consigned to each. The shipment was C. O. D. and the day the merchandise reached Tama it was seized in the hands of the express agent. This was based on an information before a justice of the peace charging that the packages contained intoxicating liquor held by the express company for sale. The court will observe that this procedure absolutely prohibited delivery of the goods to the consignee. The Supreme Court of Iowa had held that where merchandise was shipped C. O. D. the merchandise remained the property of the consignor and was held by the carrier as his agent without authority to complete the sale, and upon this premise it was decided that intoxicating liquors shipped C. O. D. from another state were subject to be seized on their arrival in Iowa in the hands of the express company. This was the question presented to this court for decision. This court cites the case of *Bowman* v. *Railway Co.*, 125 U. S. *Supra; Lesse* v. *Hardin*, 135 U. S. 100; *Thodes* v. *Iowa*, 170 Mo. *supra* and the case of *Vance* v. *Vandercook Co.*, No. 1, 170 U. S. *Supra*. In passing upon the question as to when title passed and the sale was completed, this court said:

> "True, as suggested by the court below, there has been a diversity of opinion concerning the effect of a C. O. D. shipment, some courts holding that under such a shipment the property is at the risk of the buyer, and, therefore, that delivery is completed when the merchandise reaches the hands of the carrier for transportation; others deciding that the merchandise is at the risk of the seller, and that the sale is not completed until the payment of the price and delivery to the consignee at the point of destination.
>
> But we need not consider this subject. Beyond possible question, the contract to sell and ship was completed in Illinois. The right of the parties to make a contract in Illinois for the sale and purchase of merchandise, and in doing so to fix by agreement the time when the condition on which the completed title should pass, is beyond question. The shipment from the State of Illinois into the State of Iowa of the merchandise constituted interstate commerce. To sustain, therefore, the ruling of the court below would require us to decide that the law of Iowa operated in another state so as to invalidate a lawful contract as to interstate commerce made in such other state."

The court then quotes from the case of *Norfolk & Western Railway Co.* v. *Sims*, 191 U. S. 441, as follows:

"While technically the title of the machine may not have passed until the price was paid, the sale was actually made in Chicago, and the fact that the price was to be collected in North Carolina is too slender a thread upon which to hang an exception of the transaction from a rule which would otherwise declare the tax to be an interference with interstate commerce."

The Rhodes case therefore holds that the sale of liquors took place in the State of Illinois, and the fact that they were shipped C. O. D. did not change the rule of law that the sale took place where the order was accepted and that the seizure by the officers under the laws of Iowa would necessarily prohibit the transportation and delivery of the article, and hence the question involved in the case at bar was not decided by the above case.

In the case of *Adams* v. *Express Co.*, 206 U. S. 129, the law of Kentucky provided that all shipments of spirituous, vinous or malted liquors to be paid for on delivery, commonly called C. O. D. shipments, into any county, city, town, district or precinct where this act is in force shall be unlawful and shall be *deemed sales of such liquors* at the place where the money is paid or the goods delivered; the carrier and his agents selling or delivering such goods shall be liable jointly with the vendor thereof. This court held that the express company could not be prosecuted for a violation of said statute. The court will observe that the Kentucky statute declared such shipments C. O. D. constituted a sale where the goods were delivered and made it a criminal offense for the carrier or its agents to make such deliveries. This statute completely foreclosed the right to sell and deliver any liquors sent C. O. D. in the State of Kentucky. The same is true in *Adams* v. *Kentucky*, 214 U. S. 218.

The case of *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70, cited by plaintiff in error involved the construction of the Kentucky statute which made it unlawful for any common carrier to transport beer or any intoxicating liquors to any consignee in any locality within the state where the sale of such liquor had been prohibited by the local option law of the state. The railroad company notified its agents in and out of the state to refuse to receive liquor when consigned to any local option point. Suit was instituted by the Brewing Company to enjoin the railroad company from refusing to accept the products of the Brewing Company for transportation from Evansville, Indiana, to local option points in Kentucky. This court held that it was not com-

petent for any state to forbid any common carrier to transport such articles from a consignor in one state to a consignee in another and that until such transportation is concluded by delivery to the consignee such commodities do not become subject to state regulation restraining their sale or disposition. It was ruled by this court that the statute of Kentucky as applied to interstate shipments was an illegal regulation of interstate commerce. It goes without saying that these cases do not reach the question involved in this case for the reason that in all such cases the state law in effect prohibited a sale and transportation of liquors from one state into another. But as we have tried to demonstrate in this brief, the Texas statute simply prohibits any agent in the State of Texas from collecting the purchase price of liquors shipped into that state. It prohibits a party from acting as agent of a non-resident liquor dealer in collecting the purchase price of his product and we contend is governed by the same principles as announced in the case of *Delamater* v. *South Dakota, supra.* The fact that the law of Texas prohibited an express company from acting as collecting agent in the State of Texas in the collection of the purchase price of the liquors, did not prohibit the sale and transportation of liquors into the State of Texas. These liquors were all transported after the provisions of Section 1 of the Interstate Commerce Act was in full force and effect, and the term "transportation" as defined in that act does not include the service of delivering goods shipped C. O. D., and the fact that Congress in 1909 used the term "transportation" without any limitation indicates that Congress used that term in the same sense it was used in the Interstate Commerce Act. If that was so, then Congress did not intend to limit legitimate interstate commerce in intoxicating liquors, but simply prohibited an evil that had grown up with and attached itself to such transportation, and if our position is correct in this respect then the State of Texas had a right to prohibit an evil practice which was being carried on under the guise of interstate commerce. It is not everything that is done in the shipment of merchandise in interstate commerce that is strictly interstate commerce as defined by this court. The practice of the express company acting as a collecting agent for shippers was an evil which Congress deemed should be corrected, but until Congress passed an act prohibiting such evil the states had a right to correct such an evil and such correction did not constitute an interference with legitimate interstate commerce.

III.

This record shows that the system used in selling intoxicating liquors by the plaintiff in error herein was a plain evasion of both the laws of the State of Texas and the State of Missouri. At the time the shipments in question were made by plaintiff in error, Section 7220 of Revised Statutes of Missouri, 1909, provided that "intoxicating liquors may be sold in any quantity not less than one gallon at the place where made but the maker or seller shall not permit or suffer the same to be drunk at the place of sale or at any place under the control of either or both." But plaintiff in error was not complying with this statute when he made the shipments in question. He testified as follows (see transcript of Record p. 16):

Q. Where do you reside?
A. Kansas City, Missouri.
Q. What business are you engaged in?
A. I am in the liquor business. *I am a distiller and a liquor dealer.*
Q. *Have you a distillery?*
A. *Yes, sir.*
Q. Where is your place of business?
A. *My distillery is at Liberty, Missouri. My place of business is at Kansas City, Missouri.*

The record in this case in the Supreme Court of Missouri shows that the plaintiff delivered the liquors in question to the defendant at Kansas City, Mo. They were therefore not sold at the place where made. This section has been construed by the Court of Appeals in the case of *City of Rich Hill* v. *Coleman*, 63 Mo. App. 615, in which it was held that the defendant in that case was rightfully convicted of selling liquors at his warehouse which was not the same place where his distillery was located. The defendant in that case was charged with selling one gallon of liquor in violation of Section 7220. It was admitted that the defendant before and at the time of the sale was a distiller of liquor and that his distillery was located about a mile and a half from the corporate limits of the said city; that he had an office and wareroom in the corporate limits of the said city, and that after taking liquor out of bond he removed it to said office and wareroom and used it as his place to do all his trading and shipping from in connection with his distillery and from which he did on

he day alleged in the complaint sell one gallon of liquor as alleged. n concluding its opinion the court say:

> "Can it be said with any show of reason that the defendant's office and wareroom in said city, where he made the sale, is identical with his distillery situated a mile and a half from the corporate limits of said city, where the liquor so sold was manufactured? The former is within, and the latter is without the corporate limits of said city—over the one place, the city has jurisdiction; over the other, it has not. We know of no rule of construction that would authorize us to hold that the place of sale was the same as that of the manufacture."

In the case of *State* v. *Heard*, 64 Mo. App. 334, the defendant as convicted of selling intoxicating liquors in less quantities than hree gallons without having a license as a dramshop keeper. The efense consisted in the fact that defendant was a distiller and hat the liquor was whiskey which he had made in his distillery nd sold as he contends, at the place where made. The facts were hat the defendant's distillery was at the foot of a steep hill and hat the house where he sold the liquor was at the top of this hill bout 270 feet (measured by stepping up the hill), away from the istillery, both the distillery and the house where the liquor was old being in one enclosure. The distillery, the house and the whole nclosure were in the sole possession and in the sole control of the efendant. The question involved in the case was whether the iquor was sold "at the place where made." The court, in answer o this question, under the facts, said:

> "The question, then, is, was the building where the liquor in question was sold the place where it was made, in the sense of the state statute aforesaid? We are of the opinion that it was."

And the court, in closing the opinion, says:

> "So, therefore, our interpretation of the statute is, that the liquor may be sold by the distiller at a place outside the distillery building, provided it is within the distillery premises. And we think the place shown in evidence was on such premises, when the location described is considered.
>
> This case is not like that of *Rich Hill* v. *Coleman*, decided this term. There the place of sale was wholly distinct and disconnected from the distillery."

In the case of *State* v. *Quinn*, 170 Mo. 176, the Supreme Court of Missouri affirmed the opinion of the St. Louis Court of Appeals in said cause and quoted the following language from said opinion, concerning the dramshop act:

> "The dramshop act is very broad. It provides that no person shall directly or indirectly sell intoxicating liquors in any quantity less than three gallons either at retail or in the original package without taking out a license as a dramshop keeper (Sec. 2994, R. S. 1899). A druggist may not sell in any quantity exceeding four gallons (Sec. 3047, R. S. 1899). A merchant may not sell less than five gallons (Sec. 8563, R. S. 1899)."

The only other provision of the statutes of the State of Missouri authorizing the sale of intoxicating liquors in gallon quantities was Section 7186, which defined a dramshop keeper and also provided the amount of liquor he could sell in a single sale. So far as this record shows the plaintiff could not claim a right to sell under any other statute than Section 7186 defining a dramship keeper. There is no evidence in this case showing plaintiff was a licensed dramshop keeper, but, assuming that he was, still we contend that it is a violation of the laws of the State of Missouri for the plaintiff to deliver intoxicating liquors in quantities of one gallon to a common carrier to be sent C. O. D. to various places in the several states. The whole scope and intent of the laws of Missouri relating to dramshop keepers is to require that the liquors shall be sold and delivered to the purchaser on the premises.

Section 7189 provides that no dramshop keeper shall keep a dramshop at more than one place at the same time, nor shall the license of the dramshop keeper be assignable or transferable, and all sales made by him on credit are declared void and of no effect, and the debt thereby attempted to be created shall not be recoverable at law.

Section 7191, Revised Statutes of Missouri, 1909, provides that the application for license of dramshop keeper shall state *specifically* where the dramshop is to be kept.

Section 7196 requires the dramshop keeper to give a bond conditioned that he shall keep at all times an orderly house, "and that he will not sell, give away or otherwise dispose of, or suffer the same *to be done about his premises*, any intoxicating liquor in any quantity to any minor, and conditioned that he will not violate any provisions of this article, etc."

Section 7213 makes it a penalty for every dramshop keeper "who shall sell, give away or otherwise dispose of or suffer the same to be done about his *premises*, any intoxicating liquor in any quantity to any minor, or who shall have any minor in his employ about his dramshop to play cards, dominoes, billiards, etc."

Section 7215, prohibits any dramshop keeper from selling intoxicating liquor to any person who is an habitual drunkard.

Section 7216, prohibits any person from keeping open such dramshops or selling, giving away or otherwise disposing of, or suffering the same to be done, about or on his *premises* any intoxicating liquor in any quantity upon the first day of the week, commonly called Sunday, or upon a day of a general election, etc.

Section 7219 prohibits the county clerk from granting a license to any dramshop keeper who has sold, given away or otherwise disposed of any intoxicating liquor above mentioned, etc.

Section 7220 provides that intoxicating liquor may be sold in any quantity, not less than one gallon, at the place where made, but the maker or seller shall not permit nor suffer the same to be drunk at the place of sale nor at any place under the control of the seller.

Section 7221 provides that this article shall not be construed so as to affect the right of the merchant to sell intoxicating liquor according to the provisions of the law regulating the licensing and taxation of the merchant, nor as affecting the right of wine growers to sell wine of their own production in any quantity on their own premises.

Section 7223 prohibits any dramshop keeper, druggist or merchant from selling, giving away or otherwise disposing of, or suffering the same to be done about his *premises*, any intoxicating liquors to any habitual drunkard, etc.

In the case of *State* v. *Hughes*, 24 Mo. 147, it was ruled that a license to sell liquor at a specified block in the City of St. Louis did not authorize a sale in another block in said city.

All the foregoing provisions and decisions of the courts of the State of Missouri require the dramshop keeper to sell on his premises and not elsewhere. If it is unlawful in the State of Missouri for the dramshop keeper to sell or deliver liquor in quantities of one gallon at places outside of his premises, as ruled in *State* v. *Hughes*, *supra*, then it would be unlawful to have a common carrier make such a delivery. A similar ruling to the Hughes case has been made in the case of *Panner* v. *Bugg*, 74 Mo. App. 196.

In the case of *St. Louis* v. *Tielkemeyer*, 226 Mo. l. c. 143, the court say:

> "Section 2990, Revised Statutes 1899, Ann. Stat. 1906, p. 1714, defines the term dramshop keeper as follows: 'The dramshop keeper is a person permitted by law, paying a license according to the provisions of this chapter, to sell intoxicating liquors in any quantity, either at retail or in original packages, not exceeding ten gallons.' Section 2991 says, 'No person shall directly or indirectly sell intoxicating liquors in any quantity less than three gallons either at retail or in the original package without taking out a license as a dramshop keeper.' The word dramshop keeper has a wider meaning in its general significance than that given in the statute, but the statute by its definition restricts the meaning of the word to its own purposes."

The foregoing authorities decide that under the statutes of the State of Missouri, the plaintiff had no right to sell liquor in less than three gallon packages, except under the license given him as a dramshop keeper, and we submit that under the restricted meaning of a dramshop keeper and the restrictions imposed upon such keeper, the plaintiff in error selling under a dramshop license had no right to deliver intoxicating liquors to the Express Company to be sold and delivered to places outside of the premises where his dramshop was located. This is the plain meaning of the above statute. So that under the facts of this case the plaintiff in error had no right to sell liquor at his place of business in Kansas City, Missouri, under and by virtue of the provisions of Section 7220 aforesaid, because he was not shipping it direct from the distillery, *i. e.* the place where it was made. It was all shipped from his place of business in Kansas City, Missouri. He therefore had no right to sell liquor in one gallon quantities under and by virtue of the terms of Section 7220.

Section 11640, Revised Statutes of Missouri, 1909, provides that a merchant may take out a license to sell liquors in quantities not less than five gallons. Plaintiff in error was not selling under the provisions of this statute and the only other provision relating to the sale of intoxicating liquors in the State of Missouri in less than three gallon quantities was under Section 7186, Revised Statutes, 1909, which defined a dramshop keeper as a person permitted to sell intoxicating liquors in any quantity, either at retail or in original package, not exceeding ten gallons. But defendant in

error contends that under this section the liquor must be sold and delivered to the purchaser on the premises. Plaintiff in error could not deliver these packages to the Express Company, his agent, and have it transport such liquors to another state and there deliver them, under and by virtue of the statute licensing him as a dramshop keeper. There is no evidence in this case that plaintiff had a license to sell liquors as a dramshop keeper, but, if he had, the sale of intoxicating liquors under this C. O. D. system was an evasion of the laws of the State of Missouri and never was contemplated by the legislature when it passed said act, defining a dramshop keeper.

That the sale of intoxicating liquors, C. O. D. was an evil that needed suppression is manifest by the Act of Congress, 1909.

The defendant in error therefore contends that this record shows that the C. O. D. business of selling intoxicating liquors was an evil which had grown up with and attached itself to the transportation of liquors in such commerce, and that while Congress could at any time take possession of the whole field, as it did by the Act of March 4, 1909, yet until it did so the states were left free to pass such legislation as they deemed wise in the exercise of police power to suppress such evil. Northern Pac. Ry. Co. v Washington, 222 U. S. 370. It is clear from an inspection of the Texas Statute and the Act of Congress of 1909, that they both were aimed at the same evil. Neither act prohibited the transportation of intoxicating liquors from one state into the other. This record shows that the Express Company offered to make deliveries of these intoxicating liquors to the consignees at the places of destination if the plaintiff in error would waive the collection of the C. O. D. charges. This the plaintiff in error would not do and we submit that that was as far as the Wilson Act protected these shipments. The Wilson Act does not require the carrier to act as agent for the plaintiff in collecting charges for the purchase price of liquors shipped, and the Act of Congress of 1909 recognizes the right to *transport* intoxicating liquors under the Wilson Act with just the same protection after such Act took effect as such shipments were protected before the passage of said Act.

Hence Congress did not intend to prohibit the legitimate sale and transportation of intoxicating liquors provided for and contemplated by said Wilson Act. If it had intended to limit the scope of the Wilson Act or to change its meaning in any respect, it would

have said so in this Act of 1909, but it made no modification and put no restrictions upon the provisions of the Wilson Act.

Hence it is fair to conclude that the intention of Congress in passing the Act of 1909 was simply to prohibit an evil which had grown up with and attached itself to interstate commerce, but that Congress did not intend to curtail or restrict in any way the transportation and sale of intoxicating liquors as provided for in the Wilson Act. It simply aimed at stopping Express Companies as common carriers from acting as agent in the collection of C. O. D. charges.

We therefore contend that plaintiff in error was violating the spirit and intent of both the laws of Missouri and Texas in the way he was shipping liquor in one gallon packages to all persons who ordered same, regardless of whether they were habitual drunkards, minors or insane persons and such evasion was not protected by the Wilson Act or the Interstate Commerce Act.

The case of *State of Missouri* v. *Rosenberger*, is not in point, for in that case the record does not show that plaintiff in error was engaged in manufacturing liquor at Liberty, Missouri. If he was manufacturing liquor in Kansas City he could then sell it at his place where made in one gallon packages under Section 7220 aforesaid. But his own testimony shows his distillery was located at Liberty, Mo., and therefore, he had no authority under such distiller's license, to sell liquors in one gallon quantities from his place of business in Kansas City.

IV.

The record in this case discloses many of these shipments had been made almost a month prior to the 12th day of February, 1907. Some of the shipments in question were made as early as January 12, 1907, and each of said packages was forwarded by defendant to its destination in the State of Texas and arrived there in the due course of transportation without undue delay and it was the usual and regular course of the business of defendant express company at all times herein mentioned to send written notices, properly stamped and addressed, to all consignees of express matter consigned to them. A great majority of these shipments were made to small towns in the State of Texas, which towns are set out in the petition in this case, but are not copied in this record. Some of these shipments remained in the express office almost thirty days

after arrival at destination and had not been called for by the consignees up to the time this statute went into effect. The Supreme Court of Missouri in passing upon the questions involved used this language:

> "Under this view of the case I am not able to see from what possible view point it could be considered that the question (1) of withholding the delivery of articles of commerce transported by the carrier; (2) the storage of the same until such time (not the reasonable time of their delivery) as the consignee is willing and able to pay for them and the collection of the purchase price thereof from the latter, has to do with either state or interstate commerce."

While it is true that this court has held that the term "transportation" as defined by Congress includes delivery, yet how long the carrier may hold property awaiting delivery to the consignee has never been determined as far as we are aware.

In the case of *Heymann* v. *Southern Railway Co.*, 203 U. S. l. c. 276, this court used the following language:

> "Of course, we are not called upon in this case and do not decide, if goods of the character referred to in the Wilson Act, moving in interstate commerce, arrived at the point of destination and after notice and full opportunity to receive them are designedly left in the hands of the carrier for an unreasonable time that such conduct on the part of the consignee might not justify if affirmatively alleged and proven the holding of the goods so dealt with which come under the obligation of the Wilson Act, because constructively delivered."

The contract under which these shipments moved provided that the goods should be held for a period of thirty days, and upon the request of shipper may be held for another period of thiry days (Transcript of Record, p. 22).

The Supreme Court of Missouri in passing upon the record in this case, used this language:

> "And no fair minded disinterested man can read this record without reaching the conclusion that the C. O. D. contract mentioned in this case was resorted to in order to sell intoxicating liquors in the State of Texas in violation of the laws thereof, and in order to meet this evil the statute of 1907 was by the legislature of that state enacted and not for the purpose of interfering with state or interstate commerce."

We submit that this innovation of selling intoxicating liquors in gallon quantities and transporting same C. O. D. in interstate commerce was not intended to be protected by Congress in passing the acts hereinbefore mentioned. Such sales of intoxicating liquors remove all state restrictions regulating or prohibiting the sale of intoxicating liquors to minors, drunkards, insane and dangerous individuals, and the practice of permitting liquor to be shipped C. O. D. to a consignee in a small town or city under an agreement that it is to be held 30 or 60 days for the consignee to call and get the same regardless of whether such time was reasonable or unreasonable is unwarranted and not intended to be protected by the Wilson Act. That act contemplated, as intimated by this court in the Heyman case, *supra*, that the consignee should call within a reasonable time and remove such intoxicating liquors and if he did not do so then the state laws would apply. Hence we contend that the contract in this case which provided that the defendant in error in this case should hold these shipments for a period of 30 or 60 days for the purpose of collecting the C. O. D. charges, was violative of the spirit and intent of the Wilson Act and was such an abuse of that act that the State of Texas had the right in the exercise of its police power to prohibit such course of business so long as Congress did not legislate upon the same subject. Congress having legislated upon that subject in 1909, the Act of Texas could not apply thereafter, but we contend that it was a proper exercise of the police power in the absence of Congressional legislation and that the act could apply and did apply until the taking effect of the Act of Congress of 1909, and that the state statute was not an unwarranted regulation of interstate commerce which rendered the statute obnoxious to the powers of Congress on that subject.

V.

We submit that this case should be affirmed upon the second ground mentioned in the opinion of the Supreme Court, to-wit, that an action for conversion of these liquors shipped C. O. D. could not be maintained, but that if plaintiff in error had any remedy it was an action upon the contract for refusing to collect the purchase price. If we are right in our contention that the substance of the sale of intoxicating liquors in this case was the agreement to sell and its acceptance, and that transportation of such liquor only included the duties enjoined upon the defendant

in error by Section 1 of the interstate commerce act, and if there was no duty enjoined by law upon the defendant in error to collect the purchase price of the goods carried unless it contracted to do so, then a breach of the contractual obligation at best would only afford an action for damages for failure to perform such part of the contract. A violation of the duties which the law enjoins upon the defendant in error, creates an obligation different from the obligation created by the contract, and a breach of the contractual duty is a violation of the contract for which the law provides a different remedy, from the remedy provided for a breach of the obligation imposed by law. Hence, if plaintiff has any right of action at all it is a right of action for damages for the failure to collect the purchase price of these goods. The record shows that the defendant in error offered to hold these goods at the point of destination until plaintiff could make arrangements through banks or otherwise to collect the purchase price. This, plaintiff in error refused to do. If he had any right of action at all for violation of this contractual duty it was an action for damages and not an action for conversion of the property. Hence we contend that the judgment of the Supreme Court of the State of Missouri can be sustained upon a non-federal ground, and for that reason alone, if no other, the judgment should be affirmed. Under the well known rule of this court, that where a judgment rests equally upon either federal ground or a non-federal ground, this court will affirm the judgment.

We therefore respectfully submit that the Supreme Court of the State of Missouri did not err in holding that the statutes of the State of Texas lawfully applied to an agent collecting the purchase price of the liquor shipped C. O. D., and that the duty to collect the purchase price of liquor shipped C. O. D. was not an obligation imposed by law but one assumed by contract, and that a violation of such obligation so assumed by contract at best afforded only an action for damages and did not support an action for conversion, and hence the decision of the Supreme Court of the State of Missouri should be affirmed on both grounds.

Respectfully submitted,

J. L. MINNIS,
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Attorneys for Defendant in Error.

ROSENBERGER *v.* PACIFIC EXPRESS COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 249. Argued March 8, 1916.—Decided April 24, 1916.

Speaking generally the States are without power to directly burden an interstate shipment until after its arrival and delivery and sale in original package; and this rule applies to the movement of intoxicating liquor as to other commodities.

The Wilson Act only modifies this rule as to shipment of intoxicating liquors so as to bring them under state control after delivery, but before sale, in the original package.

The power to make interstate commerce shipments C. O. D. is incidental to right to make the shipment, and an attempt by the State to prohibit contracts to that effect or prevent fulfillment thereof is, as a burden upon, and an interference with, interstate commerce, repugnant to the Federal Constitution.

The interstate commerce which is subject to the control of Congress embraces the widest freedom including the right to make all contracts having a proper relation to the subject.

The power of the State to control interstate C. O. D. shipments prior to the enactment of the United States Penal Code cannot be deduced from the enactment of § 239 of that Code prohibiting them.

Since the enactment, and by virtue of the Wilson Act and the remedial authority thereby conferred by Congress on the States to regulate sales of liquor after arrival in the State and before sale in the original packages, a State has power to prevent solicitation of orders for intoxicating liquors to be shipped from other States. *Delamater* v. *South Dakota*, 205 U. S. 93.

The statute of 1907 of Texas imposing special licenses on Express Companies maintaining offices for C. O. D. shipments of intoxicating liquors is an unconstitutional burden on and interference with interstate commerce and does not justify an Express Company accepting such a shipment from refusing to deliver the same; and in this case *held* that such refusal amounted to conversion of the goods.

THE facts, which involve the constitutionality under the commerce clause of the Federal Constitution of the

statute of the State of Texas imposing licenses on places of business of Express Companies where intoxicating liquors are delivered C. O. D., are stated in the opinion.

Mr. J. J. Vineyard and *Mr. A. F. Smith*, with whom *Mr. Frank F. Rozzelle* was on the brief, for plaintiff in error.

Mr. I. N. Watson, with whom *Mr. J. L. Minnis* was on the brief, for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

On the taking effect in Texas on the twelfth day of February, 1907, of a law imposing a state license tax of $5,000 annually on each place of business or agency of every express company where intoxicating liquors were delivered and the price collected on C. O. D. shipments, and by which law one-half of the amount of the state license was in addition authorized to be imposed by every county or municipality, the Express Company, the defendant in error, discontinued at all its agencies in Texas all such business. As a result the Company sent back to Kansas City, Missouri, the packages of intoxicating liquor which it had received under C. O. D. shipments made to various places in Texas from Kansas City by Rosenberger, the plaintiff in error, and tendered them to him conditioned on his payment of the return carriage charges. Rosenberger refused to accept the offer and brought this suit to recover the value of the merchandise on the ground that the failure to carry out the shipments was a conversion. The trial court holding the Texas act was repugnant to the commerce clause of the Constitution of the United States and afforded no justification to the Express Company for refusing to carry out the shipments, awarded the relief sought. And the object of this writ of error is to obtain a reversal of a final judgment of the court below reversing

the trial court and rejecting the claim on the ground that the Texas license law was not repugnant to the commerce clause and afforded ample authority to the Express Company for refusing to complete the interstate shipments in question. 258 Missouri, 97.

Passing minor contentions whose want of merit will be hereafter demonstrated, it is clear that the issue is this: Was the state license law if applied to C. O. D. interstate commerce shipments repugnant to the commerce clause of the Constitution? It is certain that this question, in view of the date of the law and of the shipments involved, must be determined in the light of the operation of the commerce clause as affected by the power conferred upon the States by what is usually known as the Wilson Law (Act of August 8, 1890, c. 728, 26 Stat. 313), and wholly unaffected by § 239 of the Penal Code enacted by Congress March 4, 1909, prohibiting the shipment of intoxicating liquors under C. O. D. contracts, and also without reference to the act of Congress known as the Webb-Kenyon Law of March 1, 1913 (c. 90, 37 Stat. 699).

Thus limited, as it is not controverted and indeed is indisputable that the provisions of the statute placed a direct burden on the shipments with which it dealt and in fact were prohibitive of such shipments, it follows that error was committed in holding that the statute was not repugnant to the Constitution of the United States in so far as it applied to interstate C. O. D. shipments for the following reasons: (a) Because it is settled from the beginning and too elementary to require anything but statement that speaking generally the States are without power to directly burden interstate commerce and that commodities moving in such commerce only become subject to the control of the States or to the power on their part to directly burden after the termination of the interstate movement, that is, after the arrival and delivery of the commodities and their sale in the original packages, and that this rule is

as applicable to the movement of intoxicating liquors as to any other commodities. (b) Because the Wilson Act only modifies these controlling rules by causing interstate commerce shipments of intoxicating liquors to come under state control at an earlier date than they otherwise would, that is, after delivery but before sale in the original packages. (c) Because the power in interstate commerce shipments to make C. O. D. agreements, that is, agreements on delivery of the commodity shipped to collect and remit the price, is incidental to the right to make such shipments and the commodities when so shipped do not come under the authority of the State to which the commodities are shipped under such agreements until arrival and delivery, and therefore any attempt on the part of the State to directly burden or prohibit such contracts or prevent the fulfillment of the same necessarily comes within the general rule and is repugnant to the Constitution of the United States.

These propositions in substance have been by necessary implication or by direct decision so authoritatively and repeatedly determined as shown by the cases cited in the margin,[1] that there is no necessity for going further. But in view of the fact that the court below held the statute to be not repugnant to the commerce clause not because it overlooked the rulings of this court referred to but because it considered them distinguishable or inapposite to this case for reasons deemed by it to be conclusive, there being some difference of opinion on the subject in the court below, we briefly refer to those reasons.

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[1] *Leisy* v. *Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 545; *Rhodes* v. *Iowa*, 170 U. S. 412; *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438; *Heyman* v. *Southern Railway*, 203 U. S. 270; *Adams Express Co.* v. *Kentucky*, 214 U. S. 218; *Louisville & Nashville R. R.* v. *Cook Brewing Co.*, 223 U. S. 70; *Kirmeyer* v. *Kansas*, 236 U. S. 568; *Rossi* v. *Pennsylvania*, 238 U. S. 62; *American Express Co.* v. *Iowa*, 196 U. S. 133; *Adams Express Co.* v. *Kentucky*, 206 U. S. 129.

It was said that the shipment of commodities contains two elements, one the obligation arising from the duty of the carrier to receive and carry without express contract, and the other such obligation as arises from contracts made concerning the shipment not embraced in the duty which rested by law upon the carrier in the absence of contract, the latter being illustrated by C. O. D. contracts. These two classes of obligations, it was pointed out, arising from different sources, were controlled by a consideration of the source whence they sprang, the one, the duty independent of contract, being commerce, and the other, the duty depending upon express contract in a sense independent of commerce, being governed by the law controlling contracts; that is to say, the one being controlled by the commerce clause and the other by the law of the State. And from these generalizations it was concluded that however complete and efficacious was the control of the Constitution of the United States over the obligation resulting from shipments in the proper sense, it was clear that the power of the State was complete over the other class of obligations, those arising from distinct contracts, and hence the act imposing the burden on the contract to collect on delivery did not reach over into the domain of shipment, was independent of the same, and therefore was not repugnant to the commerce clause. But we think it is a sufficient answer to say that the reasoning referred to rests upon a misconception of the elementary notion of interstate commerce as inculcated and upheld from the beginning and as enforced in a line of decisions of this court beginning with the very birth of the Constitution and which in its fundamental aspect has undergone no change or suffered no deviation: that is, that the interstate commerce which is subject to the control of Congress embraces the widest freedom, including as a matter of course the right to make all contracts having a proper relation to the subject. Indeed, it must be at once apparent that if

the reasoning we are considering were to be entertained, the plenary power of Congress to legislate as to interstate commerce would be at an end and the limitations preventing state legislation directly burdening interstate commerce would no longer obtain and the freedom of interstate commerce which has been enjoyed by all the States would disappear. But to state these general considerations is indeed superfluous since in one of the previous cases which we have cited (*American Express Co.* v. *Iowa*, 196 U. S. 133, 143, 144) substantially the identical contention which we have just disposed of was relied upon and its unsoundness was expressly pointed out and the destructive consequences which would arise from its adoption stated.

The minor contentions to which we previously referred are these:

1. That although it be that § 239 of the Penal Code has no retroactive operation, it should be used as an instrument of interpretation from which to deduce the conclusion that the power of a State to prohibit shipments of intoxicating liquors in interstate commerce under C. O. D. contracts existed at the time here in question. But this by indirection simply seeks to cause the Act of Congress to retroactively apply by reasoning which if acceded to would require it to be said that all the previous decisions of this court dealing with the subject before the Penal Code was enacted were wrong and that in addition the enactment of § 239 was wholly unnecessary.

2. That even although there was a wrongful refusal of the Express Company to carry out the shipments its doing so was a mere violation of contract, giving a right to sue in damages but not for conversion. We see nothing in the record to indicate that this contention was urged in the trial court or in the court below. But passing this consideration, in view of our previous action rejecting a motion to dismiss, the question is foreclosed. But again

even if this be put out of view, the proposition is without merit under the controlling state law. *Rice* v. *Indianapolis & St. Louis R. R.*, 3 Mo. App. 27; *Loeffler* v. *Keokuk Packet Co.*, 7 Mo. App. 185; *Danciger Bros.* v. *American Express Co.*, 172 Mo. App. 391.

3. That this case is taken out of the settled rule to which we have referred and is controlled by the ruling in *Delamater* v. *South Dakota*, 205 U. S. 93. But the proposition presupposes that the decision in that case overruled the many decisions sustaining the rule without the slightest indication of a purpose to do so. It proceeds upon an obvious misconception of the *Delamater Case* which instead of disregarding the construction put upon the Wilson Act and the many cases dealing with the subject, was on the contrary but an application in a new form of the additional power which that act gave. In other words the case but held that inasmuch as Congress by virtue of its regulating authority had caused shipments of intoxicating liquors in interstate commerce to become subject to state authority after arrival and before sale in the original packages, the exertion by the State of its authority to prevent the carrying on in the State of the business of soliciting purchases of liquor to be shipped from other States was lawful as a mere exertion of police power not constituting a direct burden upon interstate commerce, since such a regulation was within the scope of the remedial authority conferred by Congress by virtue of the Wilson Act.

And the contention just stated leads to a reference to suggestions which we deem to be wholly irrelevant to the issue for decision made both in the opinion of the court below and in the argument at bar concerning possible abuses committed as the result of C. O. D. shipments of intoxicating liquors into States where the use of such liquor is prohibited, such as the unreasonable detention of such liquors before delivery, the ultimate delivery to a

person who had not ordered the same, the transfer to others by the ostensible person to whom the shipment was seemingly made, etc., etc. We say irrelevant suggestions because we are considering here not whether a state statute enacting reasonable regulations to prevent abuses under C. O. D. shipments would be a direct burden upon interstate commerce, but are only called upon to determine whether a statute is repugnant to the commerce clause which expressly asserts the power of the State to forbid all C. O. D. interstate commerce shipments of intoxicating liquors without reference to abuse of any kind or nature in the manner in which said contracts are carried out.

It follows from what we have said that the court below erred and that its judgment must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.